CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 215

IN RE WILLIAM OLIVER, PETITIONER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITIONS FOR CERTIORARI FILED JULY 17, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

SUPREME COURT OF THE UNITED STATES

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IN RE WILLIAM OLIVER, PETITIONER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

INDEX

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—3350

STATE OF MICHIGAN

SUPREME COURT

Petition for Writ of Habeas Corpus and Ancillary Writ of Certiorari

In re: Petition of WILLIAM F. DOHANY for a Writ of Habeas Corpus and Certiorari on behalf of William Oliver. } No. 43,539.

RECORD

WILLIAM F. DOHANY,
35½ North Saginaw Street,
Pontiac, Michigan,
Attorney for Petitioner.

EUGENE F. BLACK,
Attorney General of Michigan,
EDWARD J. FALLON,
Special Assistant Attorney General,
Attorneys for Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To the Supreme Court for the State of Michigan:

Your petitioner, William F. Dohany, of the City of Pontiac, Oakland County, Michigan, respectfully shows unto this Honorable Court as follows:

1. That he is an attorney and as such is acting for William Oliver and makes this petition for his release. Further that he has knowledge of the matters and facts set forth in this petition.

2. That the said William Oliver is now confined by the Sheriff of Oakland County, Edward K. Thomas, in the Oakland County Jail at Pontiac, Michigan.

3. That to the best knowledge of your petitioner the said William Oliver is not committed or detained by virtue of any process judgment, decree of execution specified in Sec. 80 of Chap. 37 of Judicature Act of 1915 and all amendments thereto.

4. That to the best of your petitioner's knowledge William Oliver was summoned as a witness before Judge George B. Hartrick claimed to act as a one man grand jury, so-called, pursuant to Sections 28943-6, Michigan Statutes Annotated, and did appear as such witness before him on the 11th day of September, 1946, and was thereupon enjoined into disclosing any of the proceedings of said grand jury. That after testifying before said grand jury the said Circuit Judge announced that he was finding William Oliver guilty of contempt of court and sentenced him to 60 days confinement in the Oakland County Jail, and thereupon said William Oliver was taken into custody by said sheriff and has

ever since been detained to his liberty by said sheriff. That he is informed and believes that up until the 14th day of September 1946, no order of any kind had been signed by said Circuit Judge adjudging William Oliver guilty of contempt or sentencing him for contempt of court. That said William Oliver while appearing before said Judge Hartrick acting as such grand jury made truthful answers to all questions put to him and did not seek to avoid disclosing to said grand jury any information sought to be elicited from him and was not in fact guilty of any statement or conduct which could be properly and legally construed to be contempt of court and William Oliver has been advised by William F. Dohany, his counsel, that his detention and imprisonment was illegal. Further said William F. Dohany has not been allowed to confer with said William Oliver, and the illegality therefore consists in this, to-wit:

(a) William Oliver was not in fact guilty of contempt of said court.

(b) That no facts were exhibited in William Oliver's conduct as a witness before Judge Hartrick which could properly be a basis of an order adjudging William Oliver guilty of contempt.

(c) That no order adjudging William Oliver guilty of contempt was signed upon the day said William Oliver was taken into custody by said sheriff, nor has any commitment been signed to the date of filing this Writ by the committing magistrate in so far as your petitioner, William F. Dohany, has been able to determine.

(d) That the said William Oliver was denied the benefit of counsel.

(e) That the said William Oliver is not confined by virtue of any legal commitment directed to the sheriff as required by law.

Wherefore, your petitioner prays:

That a Writ of Habeas Corpus may be issued to inquire into the cause of William Oliver's said imprisonment and detention and that said William Oliver may be relieved therefrom, and that ancillary Writ of Certiorari be directed to Honorable George B. Hartrick, judge of the Circuit Court for the County of Oakland, and that an order for bail be entered pending the detention of this petition.

William F. Dohany,
Petitioner.

William F. Dohany,
Attorney.

State of Michigan,
County of Oakland—ss.

On this 14th day of September, A. D. 1946, personally appeared before me the above named William F. Dohany and made oath that he has read the above petition by him subscribed and that he knows the contents thereof and that the same are true of his own knowledge except as to those matters he states to be on his information and belief, and as to those matters he believes them to be true.

William F. Dohany,
Petitioner.

Subscribed and sworn to before me this 14th day of September, A. D. 1946.

Gloria M. Amantea,
Notary Public, Oakland County, Michigan.
My commission expires January 23, 1948.

Upon the filing of the within petition let the Writ of Habeas Corpus issue as prayed for with an ancillary Writ of Certiorari.

Neil E. Reid,
Justice of Supreme Court.

Dated: September 14, 1946.

State of Michigan,
County of Oakland—ss.

William F. Dohany being duly sworn deposes and says:

That he is the attorney for William Oliver and that he was requested to inquire into the detention of William Oliver confined to the Oakland County Jail on the 11th day of September, 1946.

That your affiant has been refused permission to talk to the said prisoner by order of the Sheriff and the Judges of the Oakland County Circuit Court.

That your affiant has made diligent search and inquiry as to the cause of confinement of said William Oliver but has been unable to find any legal record of said commitment.

William F. Dohany.

Subscribed and sworn to before me this 14th day of September, A. D., 1946.

Gloria M. Amantea,
Notary Public, Oakland County, Michigan.
My commission expires January 23, 1948.

State of Michigan,
County of Oakland—ss.

William Oliver being duly sworn deposes and says that on the 11th day of September, A. D. 1946, he was subpoenaed to testify before the Oakland County One Man Grand Jury conducted by Honorable George B. Hartrick, Circuit Judge, to give information on certain matters of a criminal nature arising in said County.

That the said William Oliver did give full, true and correct answers to all questions asked him and within his knowledge; that at no time did he give false, untrue or evasive answers to any questions put to him by the Prosecutor or the Presiding Magistrate; that for reasons unknown to the affiant the said Honorable George B. Hartrick did then and there accuse him of giving false and evasive answers and did forthwith sentence him to be confined in the Oakland County Jail for Contempt of Court.

Further deponent sayeth not.

William Oliver.

Subscribed and sworn to before me, a Notary Public, in and for the County of Oakland, this 13th day of September, A. D., 1946.

Edward K. Thomas,
Notary Public, Oakland County, Michigan.
My commission expires .....

ANSWER

To the Honorable Supreme Court of the State of Michigan:

In obediance to an Order issued in the above entitled cause on the 19th day of September, 1946, I, the undersigned, do hereby certify and return as follows:

I.

That I am a Circuit Judge in and for the County of Oakland and State of Michigan, and that as such I have been duly assigned to conduct in the said County of Oakland an investigation in accordance with the provisions of 28.943 to 28.946 of the Michigan Statutes Annotated, concerning certain violations in the said County of Oakland such as gambling, operation of gambling devices, bribery of public officers and other crimes enumerated in a petition heretofore filed in the said County of Oakland.

II.

That the undersigned entered upon such investigation as a One Man Grand Jury with Honorable Frank L. Doty and Honorable H. Russel Holland, acting in an advisory capacity by virtue of Section 27.188 of the Michigan Statutes Annotated.

III.

That in the course of my investigation, it was called to my attention that the Petitioner, William D. Oliver was the owner of certain pin ball machines which he operated throughout the County of Oakland and which

machines were suspected as having been used for gambling purposes.

IV.

Attention of the undersigned was further called to the fact that one C. A. Mitchell was registered in the said County of Oakland under the assumed name of "Midwest Bonding Company" and that under his assumed name the said C. A. Mitchell had sold to the said William D. Oliver a series of instruments designated as "bonds" and that the said C. A. Mitchell had taken from the said William D. Oliver certain sums of money for the the said bonds.

V.

That the said William D. Oliver was subpoenaed as a witness before the said Grand Jury and questioned as to the present status and location of the said bonds.

VI.

That the said William D. Oliver gave false and evasive answers concerning the status of the whereabouts of the said bonds as follows:

(a) That the said William D. Oliver testified that he had destroyed the said bonds.

(b) That the said William D. Oliver gave false and evasive answers as to the method employed by him in destroying said bonds.

(c) That the said William D. Oliver impeded the progress of the Grand Jury by refusing to give information which would enable the Grand Jury to discover said bonds.

VII.

That the Grand Jury, after investigation, is satisfied that the bonds sold by the said Carman A. Mitchell to the said William D. Oliver are the same as those sold by the said Carman A. Mitchell to Leo Thomas Hartley (No. 43,540).

VIII.

The undersigned further returns and shows that almost immediately upon the recess of the Grand Jury hearing on September 11, 1946, he was stricken ill and removed to a hospital before there was ample time to prepare an order of adjudication and that such order of adjudication was signed and entered on the 14th day of September 1946 and that a copy thereof is hereto attached and marked Exhibit "A."

IX.

That the testimony given by the Petitioner and which the Grand Jury has concluded is false and evasive, is as follows:

"• • •

Q. Now, in September of 1944 you were approached by a man named Carman A. or Carman E. Mitchell with reference to the purchase of certain bonds which were to cover pin ball machines that were owned and operated by you in the County of Oakland, that is right?

A. Yes.

Q. Where are those bonds now?

A. Well, I destroyed them.

Q. When?

A. Well, I don't remember the exact date. I imagine I destroyed it at the end of the year. You

know, when going through my papers I didn't see any use for keeping them because they had expired.

Q. What method did you use to destroy them?

A. Well, I don't know offhand just what I did do with them, whether I burned them or threw them out. I must have threw them out.

Q. Did you ever buy any bonds of that kind before?

A. No.

Q. Never had any of that kind of bonds in your possession before in your lifetime?

A. No, I never did.

Q. You never had an event of that kind occur in all your life did you?

A. No.

Q. And you want us now to understand, even in view of the fact that those were the only bonds of this type that you ever owned or handled, you want us to believe that you cannot tell us now what method you employed in destroying them?

A. I just got rid of them. I imagine I threw them into the waste paper basket. That is what I usually do. I get lots of circulations, papers, things that I have no use whatever for, threw them in the waste paper basket.

Q. When do you think you threw them away?

A. Possibly the end of the year, found them in there, run out, expired.

Q. The closest thing to accuracy that you can give us regarding those bonds, is that you are not such when you destroyed them, are not sure what method you employed to destroy them?

A. The only—I couldn't say what I did do. Probably threw them in the trash can.

Q. That is as close as you can tell us?

A. No, no, I don't remember what I did do with them. I can't say positive what I did do with them.

Q. Where were you when C. A. Mitchell first talked to you about the purchase of these bonds?

A. Well, to the best of my memory I was in his office.

* * * * *

Q. Who mentioned these bonds first, you or he?

A. He did.

Q. What did he tell you about them?

A. Oh, he just handed me one, told me to look it over.

Q. Did you look it over?

A. Yes.

Q. Did you read it?

A. Yes.

Q. What next was said?

A. Well, he went ahead to explain to me about the bonds, you know, what it was for.

Q. What did he tell you it was for?

A. To reimburse the county for any expense, extra expense they had to go to in case the machines, anybody was caught gambling on the machines or anything illegal.

Q. Your machines are perfectly legal, are they not?

A. They were, yes.

Q. Did he tell you who he was going to prevent from using that gambling device?

A. He didn't tell.

Q. Didn't you ask? You know, according to the ruling they can be gambled on?

Q. You know people go in and bet on high scores things like that.

Q. Did Mitchell mention that to you before you bought them?

A. Well, he stressed upon if the county had to go to any expense, extra expense, the bonding company would pay the expense.

Q. Did you consult the prosecuting attorney about it?

A. No, I didn't.

Q. You knew the county was involved, did you not?

A. Well, yes.

Q. Didn't you think it was any of the county's business that some stranger was making a contract for the county?

A. No, I didn't think anything special about it.

* * * * *

Q. Did you have any conversation with anybody else about these bonds before you bought them?

A. Yes, I spoke to McNamara about it.

Q. McNamara is now dead is he not?

A. Yes.

Q. Who else?

A. I spoke to Hartley about it.

Q. What conversation did you have with Hartley?

A. Well, I asked him what he thought about it. He said, well, he didn't know. He said McNamara had an attorney and was going to see the prosecutor about them. He said he was going to wait and see what information he got before he did anything.

Q. You went to Hartley and asked him what he thought?

A. I went to him or called him up, I don't know which. Anyway I discussed it.

* * * * *

Q. What protection did you think you were getting out of this transaction?

A. Well, you know, they just hand down a ruling that the machines in some places are illegal, if they caught them gambling on them, things like that. I figured it would show our good faith, we were trying to run them legitimately.

Q. How did you think C. A. Mitchell could enforce the law as far as your machines were concerned?

A. I don't know. He didn't say 'Enforce the law, show our good faith.' We had a little sticker we put on the machines.

* * * * *

Q. You didn't seek any advice from Mr. Dohany before you parted with your money, or in relation to these bonds, did you?

A. No.

* * * * *

Q. Because the story doesn't, if you want it put in language you understand, doesn't jell and we believe that, I think we all believe, that I believe that, and Judge Holland here, he is my associate, although I am technically the Grand Juror, we more or less like to have in cases of this kind, at least the advice of other reasonable persons to see whether or not we are jumping at wild conclusions, I don't think any one person who reads your testimony, reads this record, could believe this story. I don't believe my associates do, do you Judge Holland?

Judge Holland: No.

Judge Hartrick: Do you, Judge Doty?

Judge Doty: No.

* * *"

IX.

By way of further return, it is denied that the petitioner was illegally confined or that he was confined without due process, and further answering, it is urged that the petitioner's adjudication of contempt is justified by his testimony and that his adjudication of contempt should not be vacated.

Respectfully submitted,

George B. Hartrick,
Circuit Judge.

A true copy
Lynn D. Allen, County Clerk,
By Arthur P. McKenna, Deputy.
Edward J. Fallon,
Special Assistant Attorney General.

JUDGMENT AND SENTENCE

To the Sheriff in and for the County of Oakland and

To the keeper of the County Jail in and for said County:

Oakland County—ss.

Whereas, William Oliver has, on the 11th day of September A. D. 1946, been convicted before me, Honorable George B. Hartrick, a Judge of the Circuit Court for the County of Oakland, now sitting as a One-Man Grand Jury in the above entitled cause, of contempt of Court, in that on the 11th day of September, 1946, the said William Oliver appeared before me as a witness in the above entitled cause to give testimony in said cause relating to material matters being inquired into in said cause by this Court:

The said William Oliver then and there answered questions propounded to him by this Court evasively, and repeatedly gave contradictory answers to the same questions concerning matters material to the inquiry being conducted by said Court, he, the said William Oliver, being then and there under oath to tell the truth, the whole truth, and nothing but the truth, before this Court upon any and all matters material to this inquiry;

Therefore, I do hereby adjudge and determine that the said William Oliver is guilty of contempt of Court; and I do further adjudge and determine that he, the said William Oliver shall be confined in the County Jail in the City of Pontiac, County of Oakland, State of Michigan, for a period of sixty (60) days or until such time as he, the said William Oliver shall appear and answer the questions heretofore propounded to him by this Court, which questions, in the opinion of the Court, are material to this inquiry, unless he shall sooner be discharged according to law.

Given under my hand and the seal of the Circuit Court for Oakland County, at the City of Pontiac this 14th day of September A. D., 1946.

George B. Hartrick.

MOTION

Now comes Petitioner in the above entitled matter and moves that an order be entered requiring the respondent to return to this court the full testimony given by petitioner before said judge for the reason that said testimony will disclose that deponent freely and promptly admitted the purchase of the bond referred to in respondent's return and identified a duplicate of said bond submitted to him by said respondent; and it will thereupon appear from said complete return that deponent could have no purpose in failing to produce said bond before said judge, if same were in existence, or in falsifying as to the circumstances of its disposal.

Wm. F. Dohany,
Attorney for Petitioner.

AFFIDAVIT SUPPORTING MOTION

State of Michigan,
County of Oakland—ss.

William Oliver of Pontiac, Oakland County, Michigan, being duly sworn, deposes and says that he testified before the Honorable George B. Hartrick, acting as a so-called one man grand jury, on April 3, 1946, and September 11, 1946; that in the course of said testimony a duplicate of the bond purchased ~~from~~ by him ~~by~~ from C. A. Mitchell, was exhibited to and identified by him as such; that deponent freely admitted the purchase of said bond and could have no purpose in failing to produce said bond before said judge, if same were in existence.

William Oliver.

Subscribed and sworn to before me, this 15th day of October, A. D. 1946.

Gloria M. Amantea,
Notary Public, Oakland County, Michigan.
My commission expires January 23, 1948.

ANSWER OF RESPONDENT TO MOTION

I, the undersigned Circuit Judge, sitting as a one man Grand Juror in the above entitled cause, hereby certify and return as follows:

I.

That my original answer contains all of the Grand Jury testimony necessary to the present proceeding.

II.

That to reveal all the testimony of the Petitioner would result in the disclosure of Grand Jury testimony not pertinent to the present proceeding and pertinent to past and future activities of the Grand Jury relative to other matters.

III.

That in the opinion of the undersigned the full disclosure of Petitioner's testimony would seriously retard Grand Jury activities.

George B. Hartrick,
Circuit Judge.

A true copy
Lynn D. Allen, County Clerk,
By ..... Deputy.

Dated: October 17th, 1946.

SUPREME COURT ORDER DENYING MOTION

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the third day of December, in the year of our Lord one thousand nine hundred and forty-six.

Present the Honorable Henry M. Butzel, Chief Justice, Leland W. Carr, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Associate Justices.

In this cause a motion is filed by petitioner for a further return to the writ of certiorari heretofore issued herein, and a brief in opposition thereto having been filed, and due consideration thereof having been had by the Court, It is ordered that the motion be and the same is hereby denied.

It is further ordered by the Court, sua sponte, that the cause be set down for hearing as a motion on Tuesday, January 7, 1947, counsel be allowed oral argument if desired.

State of Michigan—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 4th day of December, in the year of our Lord one thousand nine hundred and forty-six.

Jay Mertz,
Clerk.

[fol. 20] 43539

Parties:

In the Matter of WILLIAM OLIVER

Plaintiff's Attorney: William F. Dohany.
Defendant's Attorney: Edward J. Fallon.

HABEAS CORPUS. CERTIORARI TO OAKLAND

Date	Proceedings
1946	
Sept. 16.	Petition filed.
Sept. 16.	Writ of habeas corpus allowed.
Sept. 16.	Writ of habeas corpus issued returnable October 7, 1946.
Sept. 19.	Proof of service of writ of habeas corpus filed.
Sept. 19.	Writ of certiorari issued returnable October 7, 1946.
Sept. 27.	Proof of notice of writ filed.
Oct. 5.	Stipulation extending return day to October 21, 1946, filed.
Oct. 11.	Answer filed.
Oct. 17.	Motion for further return filed.
Oct. 18.	Brief in opposition filed.
Dec. 3.	Motion denied, cause set for hearing January 7, 1947.
1947	
Jan. 7.	Submitted on briefs.
May 16.	Writs dismissed.

[fol. 21] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the third day of December, in the year of our Lord one thousand nine hundred and forty-six.

Present the Honorable Henry M. Butzel, Chief Justice, Leland W. Carr, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Associate Justices.

43539

In the Matter of William Oliver

In this cause a motion is filed by petitioner for a further return to the writ of certiorari heretofore issued herein, and a brief in opposition thereto having been filed, and due consideration thereof having been had by the Court, It is ordered that the motion be and the same is hereby denied. It is further ordered by the Court, sua sponte, that the cause be set down for hearing as a motion on Tuesday, January 7, 1947, counsel to be allowed oral argument if desired.

[fol. 22] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventh day of January, in the year of our Lord one thousand nine hundred and forty-seven.

Present the Honorable Leland W. Carr, Chief Justice, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Associate Justices.

43539

In the Matter of William Oliver

This matter coming on to be heard is duly submitted on briefs.

[fol. 23] [Stamp:] January Term, 1947. Filed May 16, 1947

STATE OF MICHIGAN, SUPREME COURT

In re: Petition of WILLIAM F. DOHANY for a Writ of Habeas Corpus and Certiorari on behalf of WILLIAM OLIVER

Before the Entire Bench

CARR, C. J.:

On September 11, 1946, and prior thereto, an investigation was being conducted in the county of Oakland by the Hon. George B. Hartrick, one of the circuit judges of said county, pursuant to the provisions of Comp. Laws 1929, § 17217 et seq. (Stat. Ann. § 28.943 et seq). The subject matter of such investigation involved alleged violations of the statutes of the State pertaining to gambling, operation of gambling devices, bribery of public officials, and other offenses. On the date referred to William Oliver was summoned before Judge Hartrick and questioned concerning certain matters pertaining to the inquiry. During such examination the other circuit judges of Oakland county, the Hon. Frank L. Doty and Hon. H. Russel Holland, sat with Judge Hartrick in an advisory capacity. At the conclusion of Oliver's testimony the judges unanimously [fol. 24] agreed that false and evasive answers had been given by Oliver in answer to questions. Thereupon Judge Hartrick adjudged Oliver guilty of contempt of court and sentenced him to 60 days in the Oakland county jail.

Following the conviction and sentence a petition was filed in this court on behalf of Oliver, asking for a writ of habeas corpus, with accompanying writ of certiorari, to inquire into the legality of his conviction, sentence and imprisonment. On the filing of said petition the writs were issued, and Oliver, herein referred to for the sake of clarity and brevity as the plaintiff, was released on bail. The matter is before this court on the petition and Judge Hartrick's return.

The return sets forth that, in the course of the investigation referred to, it was called to the attention of the circuit judge, acting as a grand juror, that plaintiff was the owner of certain pin ball machines which were being operated in Oakland county, and which, it was suspected, were being used for gambling purposes; and that plaintiff had pur-

chased from one C. A. Mitchell, doing business as the Midwest Bonding Company, a series of instruments referred to as "bonds," for which plaintiff had paid Mitchell certain sums of money. The return further shows that Oliver was questioned before the grand jury concerning his dealings with Mitchell, and also as to the location of the bonds in [fol. 25] question. The testimony that Judge Hartrick and his associates concluded was false and evasive is as follows:

"Q. Now, in September of 1944 you were approached by a man named Carman A. or Carman E. Mitchell with reference to the purchase of certain bonds which were to cover pin ball machines that were owned and operated by you in the county of Oakland, that is right?

"A. Yes.

"Q. Where are those bonds now?

"A. Well, I destroyed them.

"Q. When?

"A. Well, I don't remember the exact date. I imagine I destroyed it at the end of the year. You know, when going through my papers I didn't see any use for keeping them because they had expired.

"Q. What method did you use to destroy them?

"A. Well, I don't know offhand just what I did do with them, whether I burned them or threw them out. I must have threw them out.

"Q. Did you ever buy any bonds of that kind before?

"A. No.

"Q. Never had any of that kind of bonds in your possession before in your lifetime?

"A. No, I never did.

"Q. You never had an event of that kind occur in all your life did you?

"A. No.

"Q. And you want us now to understand, even in view of the fact that those were the only bonds of this type that you ever owned or handled, you want us to believe that you cannot tell us now what method you employed in destroying them?

"A. I just got rid of them. I imagine I threw them in the waste paper basket. That is what I usually do. I get lots of circulations, papers, things that I have no use whatever for, threw them in the waste paper basket.

"Q. When do you think you threw them away?

"A. Possibly the end of the year, found them in there, run out, expired.

"Q. The closest thing to accuracy that you can give us regarding these bonds, is that you are not sure when you destroyed them, are not sure what method you employed to destroy them?

[fol. 26] "A. The only—I couldn't say what I did do. Probably threw them in the trash can.

"Q. That is as close as you can tell us?

"A. No, no, I don't remember what I did do with them. I can't say positive what I did do with them.

"Q. Where were you when C. A. Mitchell first talked to you about the purchase of these bonds?

"A. Well, to the best of my memory I was in his office.

. . . . . .

"Q. Who mentioned these bonds first, you or he?

"A. He did.

"Q. What did he tell you about them?

"A. Oh, he just handed me one, told me to look it over.

"Q. Did you look it over?

"A. Yes.

"Q. Did you read it?

"A. Yes.

"Q. What next was said?

"A. Well, he went ahead to explain to me about the bonds, you know, what it was for.

"Q. What did he tell you it was for?

"A. To reimburse the county for any expense, extra expense they had to go to in case the machines, anybody was caught gambling on the machines or anything illegal.

"Q. Your machines are perfectly legal, are they not?

"A. They were, yes.

"Q. Did he tell you who he was going to prevent from using that gambling device?

"A. He didn't tell.

"Q. Didn't you ask? You know, according to the ruling they can be gambled on?

"Q. You know people go in and bet on high scores things like that?

"Q. Did Mitchell mention that to you before you bought them?

"A. Well, he stressed upon if the county had to go to any expense, extra expense, the bonding company would pay the expense.

"Q. Did you consult the prosecuting attorney about it?

"A. No, I didn't.

"Q. You knew the county was involved, did you not?

"A. Well, yes.

[fol. 27] "Q. Didn't you think it was any of the county's business that some stranger was making a contract for the county?

"A. No, I didn't think anything special about it.

* * * * * * *

"Q. Did you have any conversation with anybody else about these bonds before you bought them?

"A. Yes, I spoke to McNamara about it.

"Q. McNamara is now dead is he not?

"A. Yes.

"Q. Who else?

"A. I spoke to Hartley about it.

"Q. What conversation did you have with Hartley?

"A. Well, I asked him what he thought about it. He said, well, he didn't know. He said McNamara had an attorney and was going to see the prosecutor about them. He said he was going to wait and see what information he got before he did anything.

"Q. You went to Hartley and asked him what he thought?

"A. I went to him or called him up, I don't know which. Anyway I discussed it.

* * * * * * *

"Q. What protection did you think you were getting out of this transaction?

"A. Well, you know, they just hand down a ruling that the machines in some places are illegal, if they caught them gambling on them, things like that. I figured it would show our good faith, we were trying to run them legitimately.

"Q. How did you think C. A. Mitchell could enforce the law as far as your machines were concerned?

"A. I don't know. He didn't say 'Enforce the law, show our good faith.' We had a little sticker we put on the machines.

* * * * * * *

"Q. You didn't seek any advice from Mr. Dohany before you parted with your money, or in relation to these bonds, did you?

"A. No."

In the brief filed on behalf of plaintiff it is contended, first, that plaintiff's summary conviction of contempt constituted a denial of due process of law and hence violated [fol. 28] art. 2, § 16, of the State Constitution, and § 1 of the Fourteenth Amendment to the Federal Constitution; second, that due process of law, under both the State and Federal Constitutions, required the filing of charges, notice of hearing to the accused, and a hearing on such charges; third, that contemptuous misbehavior toward a grand jury conducting an investigation under the statutory provisions above cited is not contempt of court. These questions were all raised in the case of In re Petition of William F. Dohany for a Writ of Habeas Corpus and Certiorari on behalf of Leo Hartley, — Mich. — (decided April 17, 1947), in which the conviction of Hartley for contempt, committed under circumstances analogous to those in the case at bar, was sustained by an evenly divided court. They were discussed at some length by Justice Dethmers in his opinion, and it is unnecessary to repeat what was there said. The claims made are without merit.

This brings us to the consideration of the question whether, as a matter of fact, plaintiff was guilty of contempt of court. The return of the circuit judge as to the facts must be taken as true. This court does not weigh the testimony but examines it to determine if there is evidence to support the finding. People v. Doe, 226 Mich. 5; In re Slattery, 310 Mich. 458. An examination of the testimony given by Oliver with reference to his dealings with Mitchell leads to the conclusion that plaintiff sought to withhold his real reason, or reasons, for paying money to Mit- [fol. 29] chell, ostensibly for the bonds. No copies of these instruments appear in the record in the instant case, but the return of the circuit judge states that he was satisfied, after investigation, that the instruments were the same as those sold by Mitchell to Hartley. It may be noted in this connection that an affidavit, set forth in the record, filed by plaintiff in support of a motion for a more complete return, sets forth that said plaintiff in his testimony before the grand

jury identified a duplicate of a bond purchased by him from Mitchell. It thus appears that there was testimony before the grand jury with reference to the form of the bonds that plaintiff received from Mitchell. A copy of a bond in the Hartley case, supra, is set forth in the opinion of Justice Dethmers therein.

Plaintiff testified that he read one of the bonds, received by him from Mitchell, but his answers to questions as to why he had purchased them, and what protection he thought he was receiving through them, were vague and uncertain. The grand juror and his associates were fully justified in concluding that Oliver was intentionally evasive. He offered no plausible reason whatsoever for the payments made by him to Mitchell. What was said by Justice Dethmers in the Hartley case, supra, with reference to testimony of Hartley, may well be applied to the statements of Oliver. It is apparent that for some reason he did not wish to disclose to the grand juror the precise nature of his dealings with Mitchell. His evasive replies clearly tended to ob- [fol. 30] struct the investigation and were in consequence contemptuous in character. It is scarcely conceivable that plaintiff did not know the real reason why he took these so-called bonds from Mitchell, and paid money to the latter.

Judge Hartrick and his associates also concluded that Oliver's answers to questions relating to his disposition of the bonds were likewise false and evasive. He first claimed that he destroyed the instruments, but in answer to further questions was unable to tell when or where or by what means he did so, and finally concluded by stating that he did not remember what he did with them. Concededly, however, the instruments were of an entirely different character than any that he had ever previously possessed. If, as he at one time suggested in his testimony, he wanted to show his "good faith" in the operation of his machines, it is a reasonable inference that he would have preserved the so-called bonds.

The circuit judges had the advantage of hearing plaintiff's testimony and of noting his demeanor in giving it. The conclusion reached finds support in the record. An order will accordingly enter dismissing the petition and remanding plaintiff to the custody of the sheriff of Oakland

county for service of his sentence in accordance with the order of the circuit judge.

Signed: Leland W. Carr, C. J., Edward M. Sharpe, John R. Dethmers, George E. Bushnell, JJ.

Endorsed: Filed May 16th, 1947. Jay Mertz, Clerk Supreme Court.

[fol. 31] STATE OF MICHIGAN SUPREME COURT

In re: Petition of WILLIAM F. DOHANY for a Writ of Habeas Corpus and Certiorari on behalf of WILLIAM OLIVER.

Before the entire bench:

NORTH, J.:

WILIAM OLIVER, herein designated as plaintiff, in September 1946, after testifying in a so-called one-man grand jury proceedings conducted by Honorable George B. Hartrick, one of the Oakland county circuit judges, was committed under a sixty-day sentence for contempt of court. On plaintiff's petition we issued writs of habeas corpus and certiorari, that we might review and test the validity of his commitment. Pending the appeal he was released on giving bond. The case has been submitted to this Court, and Chief Justice Carr has written for affirmance of the sentence imposed. For reasons hereinafter noted, I am unable to concur in that result.

The proceedings incident to the hearing before the grand juror, including questions propounded to and answers made by plaintiff, adequately appear in the opinion of the Chief Justice, and therefore are not herein repeated. From that opinion, and also from the record, it clearly appears that the asserted justification for finding plaintiff guilty of contempt was, as stated by the Chief Justice, "that false and evasive answers had been given by Oliver in answer to questions." Hence the scope of our review is this: Is there any competent evidence in the record in support of the finding below that when plaintiff was testifying he gave answers which were (1) evasive or (2) false?

[fol. 32] As noted above, the testimony quoted in my Brother's opinion discloses all there is in the record bearing upon the issue as to whether any of plaintiff's answers

were evasive. A careful reading of that testimony fails to disclose a single evasive answer, especially when read in connection with the whole of the quoted testimony. Instead each answer was courteous and responsive. It is true that plaintiff was not able to give positive and definite answers to some of the questions. But that circumstance must be viewed in the light of the subject matter of the examination. So far as it was relevant or material, the examination pertained to plaintiff's conversations with one Mitchell through whom plaintiff had purchased so-called bonds * incident to the operation of various pinball machines in different localities; and to the reason why plaintiff bought the so-called bonds, also the manner in which plaintiff disposed of the bonds after they had expired by their own terms. It is important to note that the bonds were purchased in September 1944, but plaintiff's testimony involved herein was not given until two years later, September 1946. Is it at all strange that when testifying in 1946 plaintiff could not give a verbatim or detailed statement of quite commonplace conversations which occurred between him and Mitchell in 1944? Again it was a year after the bonds had expired when plaintiff was interrogated as to what disposition he had made of the then worthless papers. There is no dispute or conflict in the testimony that plaintiff destroyed the bonds or threw them out as waste paper. Can it be said that a witness who is unable to testify definitely as to how he disposed of, for example, an automobile policy that had expired a year pre-[fol. 33] viously is thereby shown to be evasive in his testimony or that he is guilty of giving false testimony? If so, many an honest person would hazard being headed for jail whenever summoned as a witness.

So far as appears from the record quoted in my Brother's opinion, plaintiff's testimony as to his reason for purchasing the bonds is true and plausible. Nothing in the record contradicts those answers. The record affords no ground for finding them either false or evasive. Perchance the testimony of this witness was not what the examining grand juror had expected the witness would give, but neither that circumstance nor anything disclosed by this record indicates evasiveness by plaintiff as to conversations with Mitchell

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* For copy of bond see In re Leo Hartley, —— Mich. ——.

or his reasons for purchasing the bonds. Such a record does not justify punishment for contempt.

Likewise as to the charge that plaintiff Oliver gave false testimony and was imprisoned therefore, a diligent review of the record fails to disclose a justification. The return of Judge Hartrick to our writ of certiorari wholly fails to specify any particular answer or answers in plaintiff's testimony that are shown by anything in the record to be false. Instead the return quotes plaintiff's testimony at length, the substance of which is embodied in the opinion herein of the Chief Justice. The return leaves it to this reviewing Court to guess which of plaintiff's answers were, in the opinion of the circuit judge, false. Such a return is not adequate nor is it fair to the person charged. Both he and we are entitled to be specifically informed of the claimed falsity, so that the issue may be accurately reviewed by this Court and so that plaintiff may purge himself of the contempt, if he finds occasion so to do. At no time has the circuit judge informed plaintiff (or this Court) of the precise portion of plaintiff's testimony that was deemed to be [fol. 34] false. Instead at the close of plaintiff's examination the judge merely announced: "Because the story (plaintiff's testimony) doesn't, if you want it put in language you understand, doesn't jell * * * I don't think any one person who reads your testimony, reads this record, could believe this story.". The character of the return in the instant case quite clearly discloses a lack of justification for punishment of plaintiff on the ground that he gave false testimony.

In a case of this character the record is fatally defective as to the charge of falsifying, unless it contains other facts or circumstances which reveal falsity or unless the testimony of the witness intrinsically discloses falsity. It is not sufficient that a judge may have knowledge *dehors* the record which might justify the conclusion that the witness gave false testimony. That is the fatal defect in the instant record as to this phase of the case. On the record before us there is no justification for concluding that plaintiff's answers or any of them were false as against the opposite conclusion—i. e., that his answers were true. Hence the circuit judge's conclusion as to falsity is without justification in this record, and plaintiff should not have been committed for contempt on the ground of assumed falsification. If the circuit judge had a suspicion that plaintiff was testify-

ing falsely, he might well have done as the court did in State v. Meese, 200 Wis. 454, 463, where it is stated:

"The court, however, was suspicious that the witness was not telling the truth, and on his own motion subpoenaed witnesses and ordered production of books and papers to determine the truth or falsity of the defendant's testimony. He found that the defendant did not testify truthfully, and that because thereof he had obstructed justice."

Had the above practice been pursued in the instant case a record might or might not have been made which would [fol. 35] have disclosed justification for a contempt commitment. But on the record before us a determination in accord with that of the circuit judge would be based on pure guess or merest conjecture. Such a record does not justify punishment for contempt of court on the grounds asserted in the instant case, in which the record is not at all comparable to that In re Slatterly, 310 Mich. 458. The distinction is sufficiently pointed out in the opinion of Mr. Justice Boyles In re Petition of Leo Hartley, — Mich. —(decided April 17, 1947).

"On certiorari the Supreme Court reviews questions of law and determines only whether there was evidence of any facts which justify findings of the trial judge." (Syllabus) In re Gilliland, 284 Mich. 604. Contempt proceedings are criminal in their nature rather than civil. Riegler v. Kalamazoo Circuit Judge, 222 Mich. 421, citing Carnahan v. Carnahan, 143 Mich. 390. It is said In re D. Levy & Co., 142 Fed. 442 (C. C. A., Second Circuit):

"We are not unmindful of the general rule that the power to imprison for contempt in such cases should be exercised with great caution, and only upon proof which establishes the facts found beyond a reasonable doubt, or which must, in any event, be clear and convincing."

The Supreme Court of Wisconsin has said:

"The power to punish for contempt is to be used but sparingly. It should not be used arbitrarily, capriciously, or oppressively." State v. Meese, 200 Wis. 454, 458.

In United States v. Moore, 294 Fed. 852 (C. C. A., Second Circuit) a headnote reads:

"The power to punish for contempt, being far-reaching and drastic should always be exercised cautiously, and with due regard to constitutional rights."

On the record before us, which does not contain testimony by plaintiff which was evasive or which showed he falsified, our conclusion is that plaintiff was unjustly committed for [fol. 36] contempt of court; and for that reason the judgment entered in the circuit court is vacated and plaintiff's bond released.

Signed: Walter H. North, Henry M. Butzel, Neil E. Reid, Emerson R. Boyles, JJ.

Endorsed: Filed May 16th, 1947. Jay Mertz, Clerk Supreme Court.

[fol. 37] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the sixteenth day of May, in the year of our Lord one thousand nine hundred and forty-seven.

Present the Honorable Leland W. Carr, Chief Justice, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Associate Justices.

43539

In the Matter of William Oliver

This matter coming on to be heard on habeas corpus and ancillary certiorari heretofore issued herein, and due consideration thereof having been had by the Court, It is ordered that the writs stand dismissed.

[fol. 38] SUPREME COURT OF THE STATE OF MICHIGAN

43539

In the Matter of WILLIAM OLIVER

IN THE SUPREME COURT, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all the proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Justices of said Court and file- in my office, as appears of record and on file in said cause; that I have compared the same with the original and that it is a true transcript therefrom and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this nineteenth day of June, in the year of our Lord, one thousand nine hundred and forty-seven.

Jay Mertz, Clerk. (Seal.)

[fol. 39] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1947

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

No. 215

In re WILLLIAM OLIVER

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

SUBJECT INDEX

INDEX TO AUTHORITIES CITED

IN THE

Supreme Court of the United States

No.....

In re WILLLIAM OLIVER

PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS

William Oliver, a citizen of the State of Michigan, respectfully shows:

1. I am in the business of renting pin ball machines. Upon occasion it has been charged that persons playing these machines have indulged in gambling.

2. In September, 1944, I was approached by a representative of the Midwest Bonding Company who offered to sell me a bond covering each of some fifty machines I was then displaying (R. p. 10), which would indemnify the county against any costs expended in prosecuting the operator of said machines for unlawful use of them (R. p. 12), and sold me the proposition of buying said bonds on the theory that it would show my good faith (R. p. 14).

3. Accordingly, I bought a bond* covering each machine leased by me and there was then affixed to each

*A copy of the bonds appears in one of the opinions in the companion case in re Hartley, appendix C.

such machine a notice that it was bonded by the Midwest Bonding Company. These bonds ran for a year, during which time there was no challenge as to the proper use of these machines. Some time after the year expired, I discarded these bonds.

4. On September 11, 1946, I was subpoenaed to appear as a witness before George B. Hartrick who is one of three judges of Oakland County, Michigan. At that time Judge Hartrick, in conjunction with his two fellow Circuit Judges, was acting in the capacity of grand juror (R. p. 8), pursuant to a Michigan statute which constitutes each circuit judge an inquisitor with powers somewhat similar to those of a grand jury. (Section 17217-20 Compiled Laws of Michigan, 1929. (See appendix B.)

5. Upon obeying said summons, I was ushered into the presence of the three Circuit Judges sitting secretly in chambers and was questioned extensively by them as to the circumstances of the purchase of said bonds and my disposal of them. I had had no previous intimation, before entering the judges' chambers, as to the subject on which I was to be questioned that day, and had no occasion to refresh my recollection in any way. I was naturally nervous upon being confronted with three Circuit Judges, but answered as best I could from my offhand recollection. When I was unable to name the time when I discarded these bonds and the particular manner in which they had been disposed of, I was placed in the custody of the sheriff and was held in the County Jail without any order of any court and without being permitted to consult with my attorney (R. p. 3).

6. On September 14, my attorney himself signed a petition for habeas corpus in my behalf (R. p. 4) and presented it to a Judge of the Michigan Supreme Court who issued a writ. On the same day Judge Hartrick entered

an order determining me guilty of contempt of court as of September 11, and sentencing me to sixty days in jail (R. p. 16).

7. As a matter of fact I was never in court during these proceedings, was never questioned by a court, and was declared guilty of contempt of court without having been before a court, and without any report of the proceedings before the grand jury having been made to a court.

8. Judge Hartrick made a return to the Supreme Court to my petition for habeas corpus in which he set forth parts of my testimony. I made a motion that he be required to return all of my testimony from which it would appear that I could have had no possible motive for falsifying as to the time or manner of discarding these bonds (R. p. 17). This motion was denied (R. p. 19) and the Michigan Supreme Court reviewed my case on the partial report of my testimony returned by Judge Hartrick.

9. The Michigan Supreme Court decided my appeal by a four to four decision, four judges holding the record showed no evidence of falsifying and four holding that it did show such evidence.

STATUTORY PROVISION GIVING JURISDICTION TO THIS COURT

10. The summary conviction of petitioner of contempt of court, without his ever having been a witness before the Court, and without notice or hearing by the Court, was a denial of petitioner's rights under Section 1 of the 14th Amendment to the Constitution of the United States which provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

11. Section 237 (b) of the Judicial Code as amended, provides:

> "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination * * *, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Consttiution * * *."

QUESTIONS PRESENTED

12. The following questions are presented:

(1) Is it a denial of due process to convict one of contempt of court summarily and without trial when the alleged misconduct is not committed in open court?

(2) Even assuming a witness has testified in open court, is it a denial of due process to convict him of contempt of court summarily and without trial for alleged false testimony, where the falsity of such testimony is not self-evident?

(3) Is it a denial of due process summarily to convict one of contempt of court by reason of alleged perjury before a one-man grand juror?

HOW QUESTIONS RAISED AND DISPOSED OF IN THE MICHIGAN COURT

13. I testified as a witness in secret chambers and not in court. I was taken directly from such chambers to the county jail and there imprisoned. There was thus no opportunity of raising any question in any inferior court. Application for writ of habeas corpus was made direct to the Michigan Supreme Court and the questions here presented were raised in the brief filed in that court. That court held against me on these propositions.

REASONS FOR ALLOWANCE OF WRIT

14. (a) Scores of Michigan citizens have been summarily convicted of contempt of court, even though they have never been before a court, by Judges acting as one-man grand jurors.

(b) The judges do this without restraint since the circuit judge of each county is a grand juror in his county and there is thus no relief except by appeal to the Michigan Supreme Court; and further, the average citizen either lacks knowledge of his rights or lacks the financial means of protecting them.

(c) Appeals from such convictions are not a matter of right but rest in the discretion of the Michigan Supreme Court, and that court has established the practice, as in the instant case, of permitting the grand juror to return only so much of the witness's testimony as he sees fit to return. Therefore, even when a review is granted, it is upon a partial record.

(d) The foregoing practice is a clear violation of the due process clause of the Federal Constitution but the Michigan courts have consistently refused to recognize that fact.

(e) The protection ordained by the Federal Constitution thus becomes meaningless for Michigan citizens unless this court intercedes in this Michigan situation.

COMPANION CASE

15. Leo Hartley was adjudged guilty of contempt by the Oakland Circuit Court under much the same circumstances and with the same result. The decision in his case is referred to in the decision in my case, and is appended hereto as Appendix C. It is reported in 317 Mich. (Advance Sheets) 441.

PRAYER

Wherefore, petitioner prays that a writ of certiorari issue out of and under the seal of this court directed to the Supreme Court of the State of Michigan commanding said court to certify and send to this court a full and complete transcript of the record and proceedings of said cause to the end that said cause be reviewed and determined by this court and that the judgment of the said Supreme Court for the State of Michigan be reversed and petitioner discharged from custody.

(Signed) WILLIAM OLIVER,

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BRIEF SUPPORTING PETITION FOR CERTIORARI

SUMMARY OF FACTS

A Michigan statute constitutes a Circuit Judge an Inquisitor with powers similar to a Grand Jury. (Sec. 17217-20 C. L. 1929). (See Appendix B.) Oakland County has three Circuit Judges. One of them, Judge Hartrick, acted as a grand juror under this statute, but had the other two judges sit in with him in his inquiry (R. p. 8).

On September 11, 1947, petitioner was summoned before these judges as a witness. He met with them in secret chambers and was questioned as to his purchase and disposal of certain bonds. They deemed his testimony untruthful and gave him into the custody of the sheriff. He was then denied the right to consult counsel (R. p. 3).

On September 14, his counsel, acting in his behalf, obtained a writ of habeas corpus from the Michigan Supreme Court. On that day an order was entered by Judge Hartwick in the Oakland Circuit Court adjudging him guilty of contempt of *court* (R. p. 15).

At no time, however, was he ever in the presence of a court.

In the Michigan Supreme Court petitioner contended that his imprisonment was a denial of due process. That court, by a four to four decision sustained his conviction, one half holding there was contempt and the other half holding there was no contempt.

There was, however, no dissent on the question of undue process, though the opinion sustaining petitioner is critical of the abuse of contempt powers by Courts.

IT IS A DENIAL OF DUE PROCESS TO CONVICT, WITHOUT NOTICE AND A TRIAL, FOR CONTEMPT OF COURT WHEN THE ALLEGED MISCONDUCT IS NOT COMMITTED IN OPEN COURT

The Michigan One Man Grand Jury Statute grants power to a one-man grand juror to punish for contempt a witness summoned before him only for "neglect or refusal to appear in response to such summons or to answer any questions which said justice or judge may require material to such inquiry." (Sec. 17218 C. L. 1929.) (Appendix B.)

In the instant case there was no refusal to appeal nor a refusal to answer questions. To justify imprisonment, therefore, Judge Hartrick had to invoke his contempt powers as a Circuit Judge. The power of the court to punish for contempt, and the procedure, therefor, is regulated in Michigan by statute. (C. L. 1929, Sec. 13910 *et seq.*) (Appendix A.) It provides:

> "Section 1. Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, *and no others:*
>
> 1. Disorderly, contemptuous, or insolent behavior, *committed during its sitting,* in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;" (Sec. 13910.)

The statute then provides that if any such misconduct "shall be committed in the immediate view and presence of the court, it may be punished summarily" (Sec. 13911), but if not committed in the presence of the court an affidavit charging the facts shall be filed, a copy served upon the accused and a reasonable time allowed to make his defense" (Sec. 13912).

The above provisions are held to be merely declaratory of the common law (*Nichols v. Judge*, 130 Mich. 187) and accord with this court's holdings that, at common law, where contempts are not committed in *open court* "the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished." *Re Savin*, 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. 699; *Cooke v. U. S.*, 267 U. S. 517, 69 L. Ed. 767. And it is therefore held:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in *open court*, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation."
>
> *Cooke v. U. S., supra.*

In the instant case the petitioner was never in the presence of a court. He was thus guilty of no misconduct in "open court" or, in the language of the Michigan statute, "*during its sitting.*" His summary confinement on September 11, 1946, was wholly illegal and the order entered on September 14, adjudging him guilty of contempt of court did not cure the illegality. To translate his con-

tempt of the grand jury, if there were one, into a contempt of court would require the familiar practice of a report to the Court and bringing the recalcitrant witness before the court by order to show cause (e. g., *In re Michael*, 326 U. S. 224, 90 L. Ed. 30, 66 Sup. Ct. 78).

IT IS A DENIAL OF DUE PROCESS TO CONVICT FOR CONTEMPT OF COURT SUMMARILY AND WITHOUT TRIAL WHERE THE ALLEGED FALSITY OF TESTIMONY IS NOT SELF-EVIDENT

For the purpose of this argument we are assuming that the testimony in question was given in open court. There then remain the further questions, was this testimony false on its face, and if not, may a judge summarily convict for contempt merely because he disbelieves it.

That the testimony was not false upon its face is answered by the fact that four members of the Michigan Supreme Court have so held (R. p. 28).

We recognize that where the falsity of testimony is self-evident, a summary conviction may follow (e. g., *U. S. v. Apel*, 211 Fed. 495). But where evidence is required to establish the falsity of testimony then due process requires a notice and a hearing on the question of the falsity of the testimony.

Boules v. U. S., 44 Fed. 2nd, 115;
Blim v. U. S., 68 Fed. 2nd, 484;
Clark v. U. S., 61 Fed. 2nd, 695;
In re Gottman, 118 Fed. 2nd, 425;
People v. Hille, 192 Ill. App. 139;
People v. Anderson, 272 Ill. App. 93;
People v. La Scola, 282 Ill. App. 328;

People v. Tomlinson, 296 Ill. App. 609, 16 N. E. (2nd) 940;
People v. Butwill, 312 Ill. App. 218, 38 N. E. (2nd) 377;
Riley v. Wallace, 188 Ky. 471, 222 S. W. 1085;
Wilder v. Sampson, 279 Ky. 103 (1939), 129 S. W. (2nd) 1022;
Hegelow v. State, 24 Ohio App. 103, 155 N. E. 620;
State v. Coleman, 138 Fla. 555, 189 So. 713.

FALSE TESTIMONY BEFORE A ONE-MAN GRAND JUROR MAY NOT BE THE BASIS OF CONVICTION OF CONTEMPT OF COURT

For a long time all Courts construed their contempt powers as giving them absolute power to treat perjury as contempt. But these holdings were restricted by *Ex Parte Hudgins,* 249 U. S. 378, 63 L. ed. 656, 30 Sup. Ct. 337, which holds that, to be punishable as contempt, perjury must have "the further element of obstruction to the court in the performance of its duty."

The precise question here presented was decided in *In re Michael,* 326 U. S. 224, 66 S. Ct. 78, 90 L. ed. 30. There a witness testified before a grand jury. He was brought before the District Court and a trial was had upon the issue of whether he had testified falsely before the grand jury. He was convicted. This Court granted certiorari and held that false testimony before a grand jury does not obstruct the judicial process and may not therefore be the basis of a conviction of contempt of court.

It follows, therefore, that Judges acting as grand jurors under the Michigan statute are without power to punish as for contempt of court one appearing as a witness be-

fore them as grand jurors, even though such witness be deemed guilty of perjury.

Respectfully submitted,

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APPENDIX A

Compiled Law of Michigan—1929.

CHAPTER V.

OF PROCEEDINGS FOR CONTEMPT

13910. CONTEMPT IN COURT OF RECORD; GROUNDS. Section 1. Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, *and no others:*

1. Disorderly, contemptuous, or insolent behavior, committing *during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due* to its authority;

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;

* * * * * *

13911. SAME; SUMMARY PUNISHMENT WHEN MISCONDUCT IS IN PRESENCE OF THE COURT. Sec. 2. When any misconduct, punishable by fine and imprisonment as declared in the last section, shall be committed in the immediate view and presence of the court, it may be punished summarily, by fine or imprisonment, or both, as hereinafter prescribed.

13912. SAME; MISCONDUCT NOT IN PRESENCE OF COURT. Sec. 3. When such misconduct is not so committed, the court shall be satisfied by due proof, by affidavit of the facts charged, and shall cause a copy of such affidavit to be served on the party accused, a reasonable time to enable him to make his defense, except in cases of disobedience to any rule or order requiring the payment of money, and of disobedience to any subpoena.

APPENDIX B

Michigan Inquisitorial Statute—Michigan Compiled Laws 1929

17217. Whenever by reason of the filing of any complaint, which may be information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justices or judge may require concerning any violation of law about which he may be questioned: and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

17218. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by

law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said offier. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

17219. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exeeeding sixty (60) days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such questions, the justice or judge may in his discretion commute or suspend the further execution of such sentence.

17220. No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall

be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him.

APPENDIX C

Opinion in Companion Case of In re Hartley (reported in 317 Mich. (advance sheets) 441)

STATE OF MICHIGAN

SUPREME COURT

In re Petition of William F. Dohany for a Writ of Habeas Corpus and Certiorari on behalf of Leo Hartley.

Before the Entire Bench.
Dethmers, J.

The Honorable George B. Hartrick is one of the circuit judges of the sixth judicial circuit duly assigned to conduct, under the provisions of 3 Comp. Laws of 1929, **17217 to 17220 (Stat. Ann. **28.943 to 28.946), a so-called one man grand jury investigation of alleged gambling and corruption of public officials in Oakland County.

In the course of the investigation it was discovered that the plaintiff, Leo Hartley, was the owner of certain pinball machines operated throughout the County of Oakland, which were suspected of having been used for gambling purposes. It was further discovered that one C. A. Mitchell, doing business under the registered, assumed name of Midwest Bonding Company, had sold to Hartley

a number of "bonds," a specimen of which reads as follows:

"EXHIBIT 'A'

"MIDWEST BONDING COMPANY

"(Operating and existing under and by virtue of the Laws of the State of Michigan, Act No. 101, Public Acts for the year One Thousand Nine Hundred Seven.)

"BOND TO GUARANTEE LEGAL PERFORMANCE

"Know all men by these presents, that Midwest Bonding Company hereinafter designated as 'Company' is hereby held and firmly bound unto Oakland County, Michigan in a sum not to exceed Two Hundred Dollars lawful money of the United States of America.

"The condition of this obligation is such, that the said Company agrees to reimburse said Oakland County, Michigan, for all moneys expended as actual costs to prosecute and convict any person or persons violating the conditions hereinafter set forth under Paragraphs (a) (b) (c) and (d); said costs shall not exceed the sum above set forth; it being hereby expressly understood and agreed that upon a conviction being had for any default in this bond that this obligation shall terminate and be null and void in so far as any subsequent violation is concerned.

"Paragraph (a) The company warrants that the certain Skill Game Machine bearing 'Midwest Tag No.....:' owned by..... located at.....will not be played or operated by any person or persons who have not attained the age of Eighteen years.

"(b) That no player of said machine shall receive any prize, reward or gain from or on account of having played said machine.

"(c) That no player, while playing said machine, shall enter into any agreement or wager to receive any prize, reward or gain from the results obtained.

"(d) That said machine shall be operated and played for amusement and skill purposes only.

"This bond shall take effect at 12 o'clock noon of the 1st day of September, A. D. 1945 and continue in effect until 12 o'clock noon of the 1st day of September 1946 unless cancelled prior thereto as above provided for its automatic termination, or by written notice delivered to Oakland County, Michigan, and such cancellation shall be without prejudice to any claim originating prior thereto.

Midwest Bonding Company
By C. A. Mitchell"

Judge Hartrick examined the bonds, deemed them worthless and illegal, and suspected that Mitchell had in that connection obtained money under false pretenses. Hartley was thereupon subpoenaed before the grand jury and questioned concerning his purchase of the bonds. He gave answers which, in the opinion of Judge Hartrick, were false and evasive. Stating that he was acting not only in the capacity of grand jury, but as circuit judge, the judge thereupon adjudged Hartley in contempt of court and sentenced him to serve sixty days in the county jail.

Plaintiff has filed a petition for a Writ of Habeas Corpus and Ancillary Writ of Certiorari. He urges that his sentence for contempt and subsequent detention are illegal because:

1. Due process of law under both the federal and state constitutions requires the filing of charges, a notice to the accused and a hearing in all contempt cases not committed in open court.

2. It is a denial of due process of law for a judge summarily to adjudge one guilty of contempt of court upon the basis of alleged false swearing, except where the court has personal knowledge of the falsity of the testimony.

3. A one man grand jury does not act as a court; therefore, contemptuous misbehavior toward a grand juror is not a direct contempt of court and is not punishable summarily.

4. The plaintiff was not in fact guilty of contempt of court.

The first three grounds may appropriately be considered together as all three are directed to the same general question of the right of the judge, under the circumstances here presented, to summarily adjudge one guilty of contempt without filing of charges, notice and hearing thereon.

In conducting a so-called one man grand jury investigation, a circuit judge acts in a judicial capacity. Mundy v. McDonald, 216 Mich. 44; In Re Slattery, 310 Mich. 458 (certiorari denied, 325 U. S. 876). This court has previously upheld the power of a circuit judge, acting as a one man grand jury, to punish summarily for contempt. People v. Wolfson, 264 Mich. 409; In Re Cohen, 295 Mich. 743. See also In Re Slattery, supra, and cases cited therein (467). While, in the Slattery case, the judge adjourned the one man grand jury proceeding and then reconvened as a circuit court before adjudging the witness guilty of contempt, in effect he was still acting as the grand jury. He made an adjudication based on his per-

sonal knowledge of what had transpired before him as a one man grand jury. No record of the pertinent grand jury proceedings was transcribed and presented to him as a circuit judge. That, we held, would have been an idle gesture. It would be an equally idle gesture to require such adjournment of the grand jury and its reconvening as a circuit court. The circuit judge, while acting as a one man grand jury may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith.

Plaintiff's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided in 3 Comp. Laws of 1929, *13912 (Stat. Ann. *27.513). It was properly dealt with summarily . 3 Comp. Laws 1929, **13910-11 (Stat. Ann. **27.511-27.512):

> "A circuit judge may take cognizance of his own knowledge of contempts committed during the sitting of the court, and its 'immediate view and presence,' and may proceed to punish summarily persons guilty of such contempts, basing his action entirely upon his own knowledge." In Re Emery T. Wood (syllabus), 82 Mich. 75.

Was plaintiff, in fact, guilty of contempt? As aptly stated in defendant's brief:

> "A mere glance at Exhibit A promptly challenges the attention of anyone to its total lack of value and to its purpose. For instance, the so-called bond does not run to petitioner. It affords him no protection whatever. His name nowhere appears in it. It would be physically impossible for Mitchell to perform the 'warranties' contained therein.

"Yet when called as a witness to explain his purchase of the bonds and his investigation of their legality, he answered as follows * * *:"

There follows portions of plaintiff's testimony, included in defendant's return to the writ of certiorari, of which we deem pertinent here the following:

"Q. Did you know Carman Mitchell prior to the time he approached you to sell you these bonds?

"A. I didn't know, only met him. I had met him a couple of times. I didn't know him to speak to. * * *

"Q. Did you notice the name of the Bonding Agency on the bond?

"A. I didn't pay any particular attention to the name until you gentlemen explained to me in court. I noticed Mid West. He told me Mid West, but I don't believe I made the check out to Mid West.

"Q. Didn't you investigate the Mid West Bonding Company to see who was operating it?

"A. No.

"Q. Did you ask Mitchell who was operating it?

"A. I didn't ask him who was operating it.

"Q. Didn't you care?

"A. Why, I should have investigated, but— * * *

"Q. But you never went to the prosecutor's office or any lawyer in private practice, to have these bonds examined, did you?

"A. No, I didn't.

"Q. You knew, Mr. Hartley, that he had no way of protecting you or your machines when you gave him this money, didn't you?

"A. Well, I didn't, I didn't know too much about it, the only thing the other fellows had bought them and just seemed like the thing to do to buy them.

"Q. Do you want us to understand that you just gave him the, this money each time you gave it without knowing what you were giving it to him for? Now, wasn't it a fact, Mr. Hartley, that you were afraid if you didn't buy these bonds or give Mitchell this money, something would happen to your machines?

"A. It isn't that I was afraid something would happen to them, but different times that I know, in 1937 we had games, we had to take them out because they ruled against them, or something.

"Q. Well, did you think when you gave Mitchell this money he could keep your machines in operation for you?

"A. No, it was that, it was to, well anything that would like it would keep them in operation, not that they were illegal or something, but always trying to pass laws, one thing and another, but the main reason I bought them was because other operators had got them and the big operators, so I thought it was the thing for me to do. * * *

"Q. Now, as a matter of fact, you were afraid if you didn't give Mitchell this money that something would happen to your machines?

"A. No, I wouldn't.

"Q. Well, how did you think he, as an ordinary individual, would give you any protection on your machines?

"A. Why, I don't know he could give me, as an ordinary individual, but I bought the bonds, he gave the bonds to me to reimburse the county for expenses. It sounded all right to me. I should had had them checked.

"Q. You said something about the law changing, or the law affecting your pin ball machines. Now, how did you think Mitchell could alter that law or keep it from being enforced?

"A. Well, that never entered my mind about that. * * *

"Q. You knew your machines were legal, didn't you?

"A. Yes.

"Q. You had an absolute right to operate them?

"A. That is right.

"Q. Just how did you think you needed any help from Mitchell?

"A. Well, the only reason I bought them is because, because I thought that these other fellows bought them and they usually know more about than I do.

"Q. Well, do you want us to think you did it because, just because somebody else did?

"A. Well that is one reason I bought them. That is the main reason, and the other is I thought the bonding company must be a good thing, or he was a bondsman, and I didn't know what it was all about. * * *

"Q. Did Mitchell explain to you that the bonds would protect the county in case somebody put the machines to an illegal use?

"A. He read the bond to me and the bond, the way it read to reimburse the county for, if they had to prosecute cases. I don't know. * * *

"Q. Didn't it occur to you to consult any official of the county?

A. No, because I asked the other operators and they had bought them, so I thought it must be all right.

"Q. Why would you consult the other operators in preference to county officials?

"A. Well, they are the ones that bought them. * * *

"Q. Did you ever hear of anyone else in your life writing a bond which would protect a county or agree to reimburse a county for any expense arising out of a prosecution?

"A. No. * * *

"Judge Hartrick: Your story, Mr. Hartley, isn't the story of a reasonable man, a reasonable man of your obvious powers of comprehension. You didn't buy the bonds offhand when the man asked you to, you made an investigation, and then

> you haven't given us a very satisfactory story of that investigation, what was said, and you haven't given us a logical man's statement of why you parted with the money, and you have all the appearances, to me you have all the appearances of a very intelligent, comprehensive witness, that is capable of understanding business and business transactions, and I don't believe you claim any incapacity along that line, do you?
>
> "A. No."

In its return to the writ of certiorari the court stated that it had found and determined that plaintiff had given false and evasive answers concerning matters material to the grand jury inquiry and was, accordingly, guilty of contempt of court. As stated in the case of In Re Slattery, supra, page 477:

> "The law is stated by Mr. Justice Fellows, speaking for the court in People v. Doe, 226 Mich. 5:
>
> "'The return must be taken as true. In this certiorari proceeding we are not the triers of the facts. We do not weigh the testimony. We may and it is our duty to examine the testimony to see if there is any evidence to support the finding. If there is we can not measure it. The finding must be accepted as true. This is settled law.'"

There is abundant evidence to support the finding of the court. It will be noted from the above testimony that plaintiff did not know Mitchell well enough to speak to, that he made no investigation of Midwest Bonding Company and no inquiry as to who was operating it. Yet he gave Mitchell money for bonds which on their face were worthless. When pressed to state his reasons for parting with good money for such so-called bonds, his first explanation was that he "didn't know too much about it,"

and then it "just seemed like the thing to do." At one point he testified that the fact that other operators had bought bonds was his *main* reason for doing so; when asked as to his other reasons, which upon further interrogation were made to appear ludicrous, he claimed that it his *only* reason; and finally, when this appeared increasingly foolish, he claimed it as merely *one* of his reasons. No more graphic demonstration of frantic flight from one untenable position to another could be imagined. Again, he offered as a reason that when in 1937 he had operated such games, they had been ruled against, but he immediately followed with the answer that he did not think Mitchell could prevent such adverse rulings and thereupon changed his reason, saying that while he considered the operations legal there were always attempts to pass laws against them. When asked later whether he had thought Mitchell could prevent passage of such laws or their enforcement, he testified that such thought had never entered his mind. Plaintiff's next explanation was that he had nursed a fond hope of saving the county harmless against costs incurred in the prosecution of persons playing his machines illegally. Then follows his explanation that he knew his machines were legal, but that he bought the bonds because he thought the bonding company, which he had previously admitted he had not investigated, must be a good thing. Then, amazingly enough, he bought the bonds because he thought Mitchell must be a bondsman. And, finally, he ended in the same vein as he started by saying that he "didn't know what it was all about."

Plaintiff's answers were obvious attempts to fob off inquiry; they were evasive and inconsistent; they reveal a manifest desire and attempt to conceal plaintiff's real reason for purchasing the bonds; they amount to sham,

fully as effective in thwarting proper inquiry by the court as an absolute refusal to answer questions at all. In the Slattery case we enunciated the applicable rule by quoting with approval from United States v. Appel, 211 Fed. 495-6, the following:

> "'The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like any one else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept that night before, if he was sane and sober, or that he could not tell whether he had been married or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry.'"

Plaintiff was properly adjudged guilty of contempt of court and sentenced therefor. Petitions for habeas corpus and certiorari are dismissed and petitioner is remanded to the custody of the Oakland County Sheriff to serve the remainder of his sentence or until the same shall have been commuted or suspended by the circuit judge, as provided by law.

Leland W. Carr
George E. Bushnell
Edward M. Sharpe
Concurred with Dethmers, J.

STATE OF MICHIGAN

SUPREME COURT

In re Petition of William F. Dohany for a Writ of Habeas Corpus and Certiorari on behalf of Leo Hartley.

Before the Entire Bench.
Boyles, J.

I am unable to concur in affirming the judgment of contempt and the sentence therefor. The writ of habeas corpus together with ancillary writ of certiorari were issued on the filing of the plaintiff's petition; and at the inception of these proceedings plaintiff was released from sustody on bail. The return to the ancillary writ of certiorari fails completely to support the finding that Hartley gave false or evasive answers. There is no claim that Hartley was contemptuous in his manner of demeanor in the grand jury room.

The testimony Hartley gave before the grand jury is set forth in full by Mr. Justice Dethmers, together with the finding announced by the grand juror at its conclusion. According to the return, this occurred in the grand jury room late in the evening of September 11, 1946. Hartley was without counsel. The grand juror then and there summarily sentenced Hartley to 60 days in the county jail for alleged contempt of court, and Hartley was forthwith confined. The order adjudging contempt and the commitment therefor was not formally made and entered until September 14th, due, as the grand juror returns, to his being stricken with illness and removed to a

hospital. William F. Dohany, who appears here as attorney for Hartley, and on whose petition in behalf of Hartley this proceeding was brought, has filed an affidavit which is in the record—subscribed and sworn to on September 14, 1946, stating as follows:

> "That your affiant has been refused permission to talk to the said prisoner by order of the sheriff and the judges of the Oakland County circuit court.
>
> That your affiant has made diligent search and inquiry as to the cause of confinement of said Leo Hartley but has been unable to find any legal record of said commitment."

Nowhere in the record or the return is there a denial of the truth of the foregoing statements, or an explanation as to why Hartley was denied the benefit of counsel as late as the third day after his confinement began. I agree, as stated by Mr. Justice Fellows in People v. Doe, 226 Mich. 5, and repeated in Re Slattery, 310 Michigan, 458, that it is our duty to examine the testimony only to see if there is any evidence to support the finding of contempt. I am not able to infer from the testimony, as quoted by Mr. Justice Dethmers, that Hartley was giving evasive or false answers, as found by the sentencing grand juror. The Slattery Case is no precedent for such a finding or conclusion in the instant case. In that case there was considerable foundation to lead to the conclusion that Slattery was giving false, or at least evasive, answers when he repeatedly answered "I don't remember" to questions quite obviously within recent memory, and of recent occurrence. The facts and circumstances in the Slattery Case have little resemblance to those in the record now before us. Slattery repeatedly answered "I don't remember" to questions which were quite obviously within his memory. In the instant case Hartley answered every question asked him, at least in so far as the record

here discloses. The answers he gave were just as compatible with the truth as otherwise. Nothing in this record warrants any other conclusion. There may have been other testimony or other circumstances within the knowledge of the grand juror which impelled him to a different conclusion. If so, it does not appear in this record. We have nothing here to show that Hartley was a lawyer, or above the average in legal skill or knowledge. We have nothing to show how much Hartley paid for the bond or bonds in question. It is apparent that the so-called "bond" shown in the record might be confusing to a layman. The bonds were worthless, a conclusion easily reached when given consideration by a lawyer, but it is fully compatible with the truth that Hartley, as he testified, was induced to pay for them by the knowledge that the other "big operators" had gotten them, that he bought the bonds to reimburse the county for expenses, and that "it sounded all right" to him. The investigation was concerning gambling, bribery of public officers, and it is not claimed that the seller of the so-called "bonds" was under investigation for obtaining money under false pretenses.

Inasmuch as the record does not contain any evidence tending to support the finding of evasiveness or untruthfulness in the answers given by plaintiff, the order of his commitment under which he technically is still in custody is hereby vacated, plaintiff released, and his bond cancelled. Our order herein shall be certified to the circuit court of Oakland county.

Henry M. Butzel
Neil E. Reid
Walter H. North
Concurred with Boyles, J.

No. 215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

In the Matter of WILLIAM OLIVER,
Petitioner

REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1947

In the Matter of WILLIAM OLIVER,
Petitioner

REPLY BRIEF FOR PETITIONER

FOREWORD

The State in its brief takes the position that we have improperly framed the questions which this appeal presents. It then attempts to restate these questions. Fortunately in doing so it narrows the issues which are presented to this Court for adjudication.

As a basis for the claim that we have incorrectly stated the first question which our original brief presents the State states that our framing of the question is based upon our erroneously assuming that Oliver was never "in the presence of a court." They say this assumption is wrong because "it is now an established Michigan doctrine that a Circuit Judge who * * * conducts a one-man grand jury inquiry 'is acting in a judicial capacity.'"[1]

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[1] Appellee's brief, p. 6.

The fact that the proceedings in the instant case took place entirely in chambers, and not in open court is not challenged. But the contention is presented that the chambers of an inquisitor is legally an open court because the Michigan Supreme Court has said the inquisitor acts in a judicial capacity. In other words the State seeks to avoid the force of the argument in our original brief on this question, not by challenging our contention as to what due process requires for the punishment of contempts not committed in open court, but by averring that such contention has no application since the contempt actually was committed in open court.

In turn the State challenges the correctness of the statement of our second and third propositions by saying that we erroneously use the term "false" in the place of "evasive" in our statement of these questions.

Further, the State takes the position that the Federal cases upon which we rely have no application to contempts in Michigan Courts.

These contentions we will discuss under separate headings.

WAS OLIVER GUILTY OF CONTEMPT IN OPEN COURT BY REASON OF THE FACT THAT THE MICHIGAN SUPREME COURT HAS STATED THAT A JUDGE ACTING AS A ONE-MAN GRAND JUROR ACTS JUDICIALLY?

This court has had occasion to say:

> "A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authority. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law."[2]

The Michigan Supreme Court in turn has had frequent occasion to define "judicial power" as that term is used in the Michigan Constitution, as "the power to hear and determine controversies between adverse parties and questions in litigation."[3]

It is true, as appellee states, that the Michigan Supreme Court has taken occasion to say that a Circuit Judge acting as inquisitor is acting in a "judicial capacity." But that is an example of the careless use of an indefinite, general term. For "judicial" is a term which has application other than to courts. This court has seen fit to quote the following language:

> "Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties;"[4]

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[2] Todd v. U. S., 158 U. S. 278, 39 L. ed. 982.

[3] Daniels v. People, 6 Mich. 381;
Lloyd v. Wayne Circuit Judge, 56 Mich. 236;
Goetz v. Black, 256 Mich. 565;
In re Sanderson, 289 Mich. 165.

[4] Reetz v. Michigan, 188 U. S. 505; 47 L. ed. 563.

And as said in an early Michigan case, "discretionary and judicial powers are often convertible terms, and there are many acts requiring the exercise of judgment, which may be fairly said to be of a judicial nature, and yet in no sense coming within the judicial power as applicable to courts."[5]

As a result courts frequently employ the term "judicial" in its general sense. Their statements in turn are adopted by other courts in a strict sense. Confusion inevitably follows. An example of this is found in *Cobbledick v. U. S.*, 309 U. S. 323; 84 L. Ed. 783; 60 Sup. Ct. 540. where the dictum appears that "the proceeding before a grand jury constitutes 'a judicial inquiry.'"

The Michigan Supreme Court in *In re Slattery*, 310 Mich. 458, cites the Cobbledick case to justify its statement that an inquisitor acts judicially. Yet whenever the question has been presented, Is a Grand Jury's inquiry a "judicial" one in the sense of an exercise of judicial powers?—the courts have answered in the negative.[6]

To determine whether a person or a body functions as a court or in some other capacity it is not sufficient to consider merely the character of the actor. As this court has said "It is the nature of the final act that determines the nature of the previous inquiry."[7] An inquisitor's final act is the issuance of a warrant. He determines no issue, makes no adjudication. He thus exercises no judicial

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[5] Daniels v. People, 6 Mich. 381, on 390.

[6] Adams v. Indiana, 214 Ind. 602, 17 N. E. 2nd, 84;
State v. Lawler, 221 Wisc. 432, 267 N. W. 65, 105 A. L. R. 568;
Coblenz v. State, 164 Md. 558, 166 A. 45, 88 A. L. R. 886.

[7] Prentiss v. Atlantic Coast Line, 211 U. S. 210, 227; 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67;
Louisville & Nashville Railroad Co. v. Garrett, 231 U. S. 298, 307, 58 L. ed. 229, 240.

powers and does not act "judicially" in the strict sense of that term. Therefore his secret sessions possess no characteristic of an open court.

For example, one does not act judicially in taking bail,[8] nor when acting as an examining magistrate,[9] even though he be a judge in fact. And, one need not be a judge to act as an examining magistrate.[10] Nor does a commissioner of the United States Court exercise judicial powers.[11]

It is thus apparent that when the Michigan Supreme Court states an inquisitor's inquiry is a judicial one, it is a loose employment of that term which furnishes no warrant for the assertion that Oliver appeared "in open court" when he was actually present merely in secret chambers.

It should be observed that in determining that a judge acting as an inquisitor is acting judicially, the Michigan Supreme Court is construing the character of an official's action, and is not in any sense construing a statute. This is not therefore a case resting on a State Court's construction of a statute, which is binding upon this court, but is the assertion of a general principle of law, which is not binding on this court.[12]

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[8] Daniels v. People, 6 Mich. 381;
In re Sanderson, 189 Mich. 165.

[9] Daniels v. People, 6 Mich. 381, 388;
Ex Parte Gist, 26 Ala. 156;
State v. Ferguson, 48 S. D. 346.

[10] Ocampo v. U. S., 234 U. S. 91, 58 L. ed. 1231.

[11] Todd v. U. S., 158 U. S. 278, 39 L. ed. 982;
Go-Bart Importing Co. v. U. S., 282 U. S. 344, 75 L. ed. 374.

[12] Town of Venice v. Murdock, 92 U. S. 494, 23 L. ed. 583.

ARE THE DECISIONS OF THIS COURT AS TO WHAT DUE PROCESS REQUIRES IN CONTEMPT CASES APPLICABLE TO THE STATE COURTS?

Commencing upon page 20 of its brief the State presents the argument that the cases of this court upon which we rely are cases construing the Federal contempt statute and therefore do not apply to the Michigan Courts. This position is taken with reference to our contention that even if it be held that Oliver was actually in the presence of a court, he could not be convicted of contempt without a trial of the issue of the falsity of his testimony.

At the outset it should be noted that the Michigan contempt of *court* statutes have been held to be but declaratory of the common law,[13] and the Michigan Supreme Court has consistently held that due process of law ordains that contempts not committed in open court are punishable only after the preferring of charges, a notice of hearing and a trial.[14]

The Michigan General Contempt Statute condemns:

> "1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

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[13] "The Statutes are in affirmation of the common law power of courts to punish for contempts, and, while not attempting to curtail the power, they have regulated the mode of proceeding and prescribed what punishment may be inflicted." Langdon v. Wayne Circuit Judges, 76 Mich. 358, 367.

[14] In re Wood, 82 Mich. 75;
Smilay v. Judge, 235 Mich. 151;
In re Gilliland, 284 Mich. 604, 612;
In re Na Lepa, 298 Mich. 310.

"2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;"

* * * * *

"7. All persons summoned as witnesses for refusal or neglect to obey such summons, or to attend or to be sworn, or when so sworn, to answer any legal and proper interrogatory." [15]

The Federal Statute insofar as it pertains to contempts committed in open court is fully consonant with that of the Michigan Statute. The Federal Statute provides that the power of Federal Courts to punish for contempt "shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of said courts,"[16] The distinction between the Federal and Michigan statutes, as to offenses committed in open court is this; the Federal Statute renders any "misbehaviour" in open court punishable whereas the Michigan Statute specifies what particular misbehaviours shall be punishable. In other words the Federal Statute leaves "misbehaviour" to its definitions at common law, which the Michigan Statute (held to be declaratory of the common law) gives express common-law definitions of punishable "misbehaviour."

The curtailment by Congress of the Federal Courts' power to punish for contempt applies only to contempts committed *not in the presence of the court*, and it is only as to such contempts that the Federal Statute differs from the Michigan Statute.

It will thus be seen that the difference in the Federal and State contempt powers has no application to our proposition that, even though the inquisitor be deemed to be holding court, he may not punish summarily because he deems the testimony of a witness false.

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[15] Sec. 13910, C. L. 29; Sec. 28.511 M. S. A.

[16] 28 U. S. C. A. 385.

Thus in the Hudgings[17] case the alleged false swearing which it was sought to punish for contempt was commited in open court. It it were contemptuous "misbehaviour," it was punishable forthwith even under the Federal Statute. But this Court rules that mere false testimony is not in and of itself contemptuous misbehaviour, and that before it can be held to constitute contempt it must appear that it have a tendency to obstruct the administration of justice.

This language "obstruct the administration of justice" is no part of the Federal Statute insofar as it relates to contempts in open court. Rather, it is language that has long been accepted as defining the kind of misbehaviour in open court which is punishable as contempt. As early as 1883, we find precisely that language used by an English author in defining contempts, and it may well be that the language of this court in the Hudgings case was adopted from the author.[18]

The matter was clarified by the decision in *Matter of Michael,* 326 U. S. 224, 90 L. Ed. 30. In that case there was no question of a full hearing on the contempt charge. After a full hearing, Michael was adjudged guilty of having testified falsely before a grand jury and upon that basis was adjudged guilty of contempt. This court says:

> "Our question is whether it was proper for the District Court to make its finding on that issue (the falsity of his answers) the crucial element in determining its power to try and convict petitioner for contempt."

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[17] Ex Parte Hudgings, 249 U. S. 378, 632 L. ed. 656, 30 Sup. Ct. 337.

[18] Sir John Fox, in his History of Contempt of Court, in his analysis of Lord Selborn's Classification of Contempts in 1883, includes any stranger to the pending suit "who was guilty of an offense which obstructs or tends to obstruct the administration of justice." (Page 44—1927 Edition.)

This court then points out that even though false testimony tends to defeat the ultimate objective of the trial, it need not necessarily obstruct or thwart the judicial process, since it is the function of the court to hear truthful and false witnesses. And this Court continues:

> "It is in this sense, doubtless, that this court spoke when it decided that perjury alone does not constitute an 'obstruction' which justifies exertion of the contempt power and that there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty.' "

WAS OLIVER GUILTY OF EVASIVE AND NOT FALSE ANSWERS?

The State's brief seeks to create a distinction between liability for contempt for false answers and liability for contempt for evasive answers. But this is a distinction which the record does not permit. For in this case there was no parrying of questions. In every instance there was a direct answer. If the answers were truthful, there was no evasion. If they were false, evasion may be said to have been practiced. It is a case where the evasiveness of the answers depends upon their falsity. There is therefore no room to claim the answers were evasive but not false, or that Oliver was guilty of contempt because of evasive answers and not because of false answers.

The language of the judge in passing condemnation upon petitioner makes it clear that his condemnation was based upon the opinion that the testimony was false. He stated:

> "Q. Because the story doesn't, if you want it put in language you understand, doesn't jell, and we believe that, I think we all believe, that I believe that, and Judge Holland here, he is my associate, although

I am technically the Grand Juror, we more or less like to have in cases of this kind, at least the advice of other reasonable persons to see whether or not we are jumping at wild conclusions, I don't think any one person who reads your testimony, reads this record, could believe this story" (R. 14).

CONCLUSION

The State's brief states with commendable frankness that "no informed person would assert that a constructive contempt committed entirely outside the precincts of a court may be punished summarily without notice or hearing."[19] They strive to defeat that principle in the instant case by arguing that an inquisitor's secret chambers (which are often a secret hideout far removed from the Court Building) are in legal contemplation an open court.

This contention is illustrative of the violence to legal principles which characterizes much of the activities of Michigan inquisitors. If it be true that the Michigan Supreme Court has persuaded itself to such a conclusion, we can understand how it can rule, as it has in this and other cases, that the appeal of an alleged contemnor should be judged, not on the full record, but on such a record as his prosecutor chooses to return.[20] Thus petitioner has had the remarkable experience of having been adjudged guilty of contempt of court after no hearing in the Circuit Court and of them being denied a full hearing in the Michigan Supreme Court.

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[19] Appellee's Brief, p. 16.

[20] c. f. In re Slattery, 310 Mich. 458, as well as the instant case.

This Court should find genuine satisfaction in remedying such a situation.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 215

IN THE MATTER OF WILLIAM OLIVER,
Petitioner

BRIEF IN ANSWER TO BRIEF OF STATE BAR OF MICHIGAN

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INDEX TO CASES

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FOREWORD

A brief has been filed allegedly upon behalf of the State Bar of Michigan as *amicus curiae*. It is signed by Wilber M. Brucker as chairman of the Special Committee of the Michigan State Bar on the One-Man Grand Jury System.

We have no objection to this court receiving aid from any source in a decision of the instant case. But we do challenge the right of anyone to file a brief in the name of the State Bar of Michigan and we challenge the right of Mr. Brucker to sign such brief in his capacity as chairman of the Special Committee.

We admit that at the January 9, 1948 meeting of the Board of the State Bar of Michigan, a motion was passed "that the President be authorized personally and under his direction with the help of such lawyers as he may designate to file a brief *amicus curiae* in the United States Supreme Court in the William Oliver case." It will be noted that this motion does not indicate on what proposition or upon which side of same such brief should be filed. The Commissioners of the State Bar have no right to commit the State Bar as such to support either side on the issues before this court, and the filing of a brief in its name has therefore met with the prompt and severe condemnation of a large number of the members of that body.

Our challenge to the signing of the brief by Mr. Brucker as Chairman of the Special Committee goes to the fact that this Committee has never met since its reappointment in September of 1947, and its members have not in any way authorized its chairman to sign a brief as such or to take any sides in the instant case.

The abuses of the contempt powers by inquisitors was brought to the attention of this special committee at its last meeting which was held in June, 1947. The committee felt unprepared to dispose of that subject. This was one of the reasons it asked that its life be extended. The committee has thus never put itself on record on such contempt procedure abuses. And Mr. Brucker has no right to represent to this court that it has done so by filing a brief as its chairman.

To render the arguments presented in the Brucker brief specious, resort is had to the ascribing of false statements to us and to the presentation of the most glaring misstatement of facts. Typical is the statement (p. 30),

that in Michigan contempt cases trial by jury is allowed. We know of not a single instance in Michigan history where a jury was allowed in a contempt case. And if there ever was such in some remote district, it was by grace of the judge, and not as a matter of right.

The attorneys for the petitioners feel that the controlling facts are so few and the applicable principles so clear, that these alone need be considered by this court, and that charges and countercharges on irrelevant facts may tend to confuse rather than to aid the court. Yet we may not permit misstatements to go unchallenged.

We have decided that in this case, contrary to the usual practice, we will, in this reply brief, first present our views upon the legal principles touched upon by the Brucker brief. The Court may stop with these, if it pleases. But that the Court may have a correct view of all the facts, we will follow with a discussion of the alleged facts and the observations based thereon which the Brucker brief presents.

DOES A JUDGE ACTING AS A ONE-MAN GRAND JUROR "HOLD COURT"?

The Michigan Supreme Court has not been so bold as to come out flatfootedly with the statement that a Circuit Judge, while acting as inquisitor under the statute, is holding court. It has said that he is acting "judicially." And in the Hartley case, (the companion case to the instant case and which the instant case follows), it does say that Hartley's contempt "was committed in the face of the court."

This language of the Michigan Court is made the basis of the argument by the Brucker Brief that in Oliver's case

there was in truth and fact an actual contempt of court as distinct from a contempt of the inquisitor. And it supports this argument by the statement that Oliver testified "on the witness stand in the court house." No record citation is given to support that statement and we have searched the record in vain for support for it.

But while the Brucker brief does not hesitate to go outside the record to make this assertion, it is noteworthy it does not venture to say that in truth and fact Oliver testified at a session of a court.

The record is that Oliver testified "in secret chambers." The return of the Circuit Judge does not challenge this statement. Even the Brucker brief does not challenge this statement. It merely alleges that the court room was used as the secret chambers. We are willing to admit that at times inquisitors use the court rooms as secret chambers. But even the staunchest supporters of the Michigan Judicial Inquisitorial System admit that these secret chambers at other times are in office buildings, hotel rooms, and even private dwellings. As one of them has observed:

> "In addition to his regular offices, Judge Ferguson maintained a secret suite on the 19th Floor of the National Bank Building, and at various times had as many as two other secret meeting places, or 'hideouts,' as they were dubbed by the newspapers."[1]

The matter thus resolves itself into the question, "Does a Judge take his Court with him wherever he goes, and does he constitute a Court wherever he may find himself, with the power inherent in a court to punish as for con-

[1] 28 Jl. Am. Jud. Soc. 142.

tempt a witness whose testimony he chooses to disbelieve?"

The Michigan Supreme Court first ascribed the term "Judicial" to an inquisitor's activities in a case which involved neither the constitutionality of the statute nor the inquisitor's power of contempt.[1] It then adopted the loose language of that decision as a basis for holding the inquisitorial statute constitutional[2] and later for justifying contempt of court judgments by inquisitors.[3]

Aside from the bald pronouncement of the Michigan Supreme Court, not a single authority is submitted to this court to justify the State's contention that an inquisitor is in truth a court. We do not deem it necessary to brief this proposition exhaustively, and will therefore content ourselves with citing a few authorities out of the abundance available.

Definitions of what constitute a court usually start with Blackstone who followed Coke in saying that a court is "a place where justice is judicially administered" (3 Bl. Comm. 23), and consists of three parts, "the actor or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make satisfaction for it, and the judex, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, by its proper officers, and to apply the remedy" (3 Bl. Comm. 25).

The most complete definition of "court" probably is "An organized body with defined powers meeting at cer-

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[1] *Mundy v. McDonald*, 216 Mich. 444.
[2] *People v. Doe*, 226 Mich. 5.
[3] *In re Slattery*, 310 Mich. 458.

tain times and places for the hearing and decision of causes and other matters brought before it, aided in this proper business by its proper officers, viz: attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure due order in its proceedings. *Rudd v. Hazard*, 266 N. Y. 302; 194 N. E. 764; *Ex Parte Gardner*, 22 Nev. 280; 39 Pac. 570; *Fitz-Patrick v. Simonson Bros. Co.*, 86 Minn. 140; 90 N. W. 378; *State v. Baudoin*, 115 La. 773; 40 So. 42.

Michigan stands alone in deciding that a judge constitutes a court, even when he is exercising non-judicial functions in secret hide-outs. Whenever the question has arisen the Courts have been uniform in their decisions that a judge is not a court.

In re Election, 281 Pa. 281; 126 Atl. 568;
U. S. Life Insurance Co. v. Shattuck, 57 Ill. App. 382;
Ex parte Gardner, 22 Nev. 280; 39 Pac. 570;
People v. Board, 151 N. Y. 75, 45 N. E. 384, 387;
Hartshorn v. Ill. Valley Railroad Co., 216 Ill. 392; 75 N. E. 122, 126;
Eichoff v. Caldwell, 61 Okla. 217; 151 P. 860, 861.

"Courts or tribunals in the nature of courts are the only agencies of the law by which a cause can be heard and determined. They are the only depositaries of judicial power. Without them it lies dormant and inactive in the sovereignty of the State. Its active and potent existence is inseparable from that of a court. * * * To constitute a court the judge or judges must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court."

Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448.

> "Certainty, both as to time and place, is essential to the conception of a court of justice; it would be eminently Caligulan could it act when and where it pleases the judge. Without recourse to the notion of a Court as a sort of incorporate entity, it is obvious that a judge does not at all times and places constitute a court, and that he cannot, when he pleases assert and enforce his judicial power. He becomes a judge when he is appointed or elected, but he becomes a court only when, at the time and place designated by law, he performs judicial duties."
>
> *Venhoff & Co. v. Morgan*, 11 Ky. Law Rep., 276, 278.

The Michigan Court is not without guidance in its own decisions as to what constitutes a court, even though it chooses to ignore them.

> "By courts, as the word is used in the Constitution, we understand permanent organizations for the administration of justice, and not those special tribunals provided for by law that are occasionally called into existence by particular exigencies, and that cease to exist with such exigencies."
>
> *Streeter v. Paton*, 7 Mich. 341, 347;
> *Shurbun v. Hooper*, 40 Mich. 503.

How aptly this applies to inquisitors, who are called into existence only by the special exigency of a complaint charging a crime being filed with them.

> "A court consists in its jurisdiction and functions and not in its title or name."
>
> *Kates v. Reading*, 254 Mich. 158.

On page 3 of our original Reply Brief we quoted this court's definition of "Court" in *Todd v. U. S.*, 158 U. S. 278, which is in full accord with the foregoing authorities.

In holding that an inquisitor acting in secret, even at a "hideout," carries with him judicial power and constitutes a "court," the Michigan Supreme Court is completely at variance with the fundamental concept of a court and with the holdings of all of the courts that have been called upon to construe the term "Court." And when it is recalled that the contempt powers which they seek to exercise are those which are reposed "in every court of record" (Sec. 13910 C. L. 1929), their violation of due process is indisputable.

IS THIS COURT BOUND BY THE HOLDING OF THE MICHIGAN COURT THAT INQUISITORS ACT IN A JUDICIAL CAPACITY?

We accept the familiar *general* rule that this court is bound by the construction placed upon a statute of a state by its highest court. But this rule does not apply here for two reasons: (a) The holding that inquisitors act in a judicial capacity does not involve a construction of state statute, and (b) The general rule does not apply where the principle of due process of law is involved.

(a)

The State Bar's brief assumes, without any attempt to demonstrate it, that the holding that an inquisitor acts "judicially" involves a construction of a state statute. Yet an examination of each of the cases in which that term was employed will disclose that the court did not have under consideration the construction of any phrase, clause, sentence or paragraph of the statute. In none of those cases was it considered that there was any uncertainty, indefiniteness, or ambiguity in the statute which required construction. On the contrary, when the court made use of

the phrase "judicial capacity" it was to describe not a term employed in the statute, but the character of the activity engaged in by inquisitors. In its ultimate use, and in that now under consideration, it was employed to characterize an inquisitor's session as a session of the court itself.

The pronouncement that an inquisitor's session constitutes holding court thus involves no statutory construction and is a mere misapplication of legal principles, and such pronouncement by the Michigan Court does not bind this court.[1]

(b)

It should be self-evident that if in fact an inquisitor's session is not the holding of a court, a state court could not defeat a citizen's right to due process merely by attaching the label "Court" to an inquisitors proceeding. The power to punish summarily for contempt under state statutes giving courts of record contempt powers cannot be conferred upon a temporary body or tribunal merely by calling such a body or tribunal a "Court."

And so this court has consistently held that it is not bound by state court's construction of its statutes, where due process of law is involved.

Grannis v. Ordean, 234 U. S. 385, 394; 58 L. Ed. 1363, 1368;
Murray v. Gibson, 15 How. 421; 14 L. Ed. 755;
Norton v. Shelby County, 118 U. S. 425; 30 L. Ed. 178;
Stutsam County v. Wallace, 142 U. S. 293; 35 L. Ed. 1018;
Sco't v. McNeal, 154 U. S. 34, 38 L. Ed. 896.

See also *Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. ed. 1192.

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[1] *Town of Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583.

DO MICHIGAN JUDGES WITHOUT RESTRAINT ENGAGE IN THE PRACTICE OF SUMMARILY CONVICTING CITIZENS OF CONTEMPT OF COURT EVEN THOUGH THEY HAVE NEVER BEEN BEFORE A COURT?

The above proposition was asserted by us as a reason for the allowance of the writ of certiorari. The State Bar's brief says flatly, "This charge is untrue," and "has no foundation in the record in the instant case nor in the record of any other Michigan case."

The instant case, and the companion Hartley case, are typical. Neither of these men ever was before a court. Both were imprisoned for contempt of court. Those are the bald facts. No pronouncement of a court that a grand juror acts in a "judicial" capacity can operate to transform his secret chambers into a court.

When we said that the judges act in this respect without restraint we had in mind the practical situation that results from the joining of the judicial powers and the executive powers in the one-man grand juror. By virtue of his office a Circuit Judge is the highest judicial officer in the county. Exercising his grand jury powers of appointing special prosecutors, marshaling witnesses and directing prosecutions, he becomes the highest prosecuting official in the county, and is "not under the control of either the prosecuting attorney or the state attorney general."[1]

When the elected prosecutor disregards a citizen's rights, the latter may at once appeal as of right directly to the circuit judge for relief. But when the grand juror or his aids violate such rights, there is no county judiciary officer to whom he can turn for relief. There is thus

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[1] *In re Recount*, 270 Mich. 328, 321.

absent that normal restraint which State Constitutions under the American Governmental system were intended to provide.

It is the very fact that the judges know that there is no one above them in the county to whom a citizen can turn for relief which is at the root of most of the abuses of the one-man grand jury system.

Moreover, when a grand juror imprisons one for contempt, there is no right of appeal. A special application to the Supreme Court for leave to appeal is required. A transcript of the testimony is never available to the citizens as a basis of an application for leave to appeal. And there is thus scant opportunity for the ordinary person to move the discretion of the Supreme Court to grant him an appeal.

The instant case graphically illustrates this pernicious situation. The facts when returned to the court were not such as to impel a majority of the court to grant relief. It is obvious therefore that had Oliver filed an application for leave to appeal such application must have been denied. It was only the fortuitous circumstance that no order ever was entered for his imprisonment, thus entitling him to a writ of Habeas Corpus, which enabled him to get into the Michigan Supreme Court at all.[1]

* * * * *

In discussing the above proposition the State Bar brief states that the one-man grand juror "holds court * * *. grants orders of immunity, maintains and signs the daily

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[1] Imprisonment without any order is not singular to this case. The same course was followed in *In re Slattery*, 310 Mich. 458. In each case the entry of an order followed the taking of steps by the prisoner for an appeal.

journal of the court, is expected to maintain the dignity of the court, and in every other way to conduct the functions of the Circuit Court."

Three false statements appear in that sentence.

(1) No man functioning as a grand juror can "hold court," for by statute the grand jury proceedings are required to be secret, with the injunction of secrecy imposed upon every person whom the juror may permit to be present. This hardly conforms to the requirement of an open court.

(2) The statute does not authorize the entering of orders granting immunity, nor do inquisitors follow the practice of entering orders of immunity. Herein lies one of the vices of the system. The statute does require that where one is compelled to answer incriminating questions, the questions and answers shall be entered upon the docket or journal of the judge, and as to such questions the witness shall thenceforth have immunity. In practice the judges fail to enter such questions upon the docket lest persons affected by such testimony will thus have notice. The witness then is without any protection. Should anything happen to the judge or to his recollection (and instances have occurred where as much as a year elapsed between the compelling of the answer and the entry of the questions on the docket) the witness is without protection.

Another vicious aspect follows. The prosecutor and the judge go through the ceremony which the statute ordains shall operate as a grant of immunity to a witness. The witness is given to understand he has immunity, not knowing that it is limited to the certain specific questions which are enumerated by the prosecutor. The witness then testifies freely under the assumption of immunity, only to be

met with a subsequent warrant for a crime not embraced within the specified questions.

(3) With two exceptions, an inquisitor's activities are not recorded in the daily journal of the Court. Indeed, not even his presence is noted there. The exceptions are

(a) A record of the incriminating questions, as to which a witness shall thenceforth by statute have immunity. These in practice are not entered in the daily journal until months later, a page being left blank in the journal for that purpose.

(b) Orders adjudging witness guilty of contempt of Court.

IS THE QUESTION OF THE DENIAL OF DUE PROCESS BY REASON OF A FAILURE TO RETURN THE FULL TRANSCRIPT OF THE WITNESS'S TESTIMONY BEFORE THIS COURT?

Neither in our brief nor in our argument before the court have we urged this court to reverse this conviction merely because the partial return of the witness's testimony to the Supreme Court constituted a denial of due process. The Brucker brief's claim that we have done so is in keeping with the tenor of the balance of the Brucker Brief. The questions we present are much more basic,—the denial of due process in the original commitment.

The facts that respondents in Michigan Courts not only have no hearing in the Circuit Court, but are denied a hearing on a full record in the appellate court naturally came out upon the presentation of the case to this court. It is a part of narrative of the facts. It was apparently shocking to this court that such an appellate practice could have developed. But to us it is much more shocking that an accused charged with contempt not committed in open

court be denied *any* trial in the lower court than that he be given a trial only upon an incomplete record in the appellate court.

The question of whether due process is violated by an incomplete return of the testimony upon which the witness was convicted will become of no importance when it is determined either that alleged false testimony before an inquisitor cannot be the basis of contempt of court, or, if it can be the basis, that it can be translated into contempt of court only by the filing of a charge in court and a hearing upon that charge. In the latter case the hearing will be a public one and there will be no question of suppressing any portion of the record on appeal.

The pernicious practice of denying a full record on appeal will of necessity vanish with the pernicious practice of an inquisitor jailing a citizen without a hearing.

The facts, however, are before this Court. Oliver demanded a full record. This demand was overruled. There was thus a clear violation of due process which this Court might well condemn.

The denial of an appeal upon a full record is but one of the vices which flows from the assumption of executive powers by the judiciary. It is characteristic of judges thus acting to lose sight of true values and to become so warped in perspective and so clouded in their faculties that their ordinarily sound sense of propriety and justice does not function. All trace of judicial temperament vanishes.

Witness the *regular practice* of detaining as prisoners witnesses who respond to subpoenae, the too common use of subpoena *duces tecum* as search warrants, the insistence on acting as examining magistrates to determine whether there was basis for their own warrants, the insistence on themselves determining all challenges to their actions

which may come in the form of motions to quash warrants, motions for return of property, etc. Witness Judge (now Senator) Ferguson denying McCarthy a transcript as a basis of appeal on the ground that by the statute "he was prohibited from doing so"!

And the Michigan Supreme Court seems to have become infected with the same infirmity, as evidenced by its decisions, hereinafter reviewed, in cases arising under the inquisitorial statute.

WHAT WAS THE BASIS OF PETITIONER'S CONVICTION?

The attorneys for the petitioner state frankly that they have no interest in petitioner's guilt of innocence. Their only concern is that the law of the land be observed before his guilt be adjudicated.

At the same time it is important that he not be prejudiced before this court by the Brucker brief's contention as to his guilt.

The Brucker brief advances a theory that the money Oliver paid was for protection and was disguised as a premium on bonds. In other words, that officials got this money and that they were foolish enough to create evidence of their dealings by issuing bonds and attaching stickers to the machines in question. But the fact is that the Inquisitor got no such impression from Oliver's testimony. To convict Oliver of falsity only adds to the circumstances of the disposal of the bonds. His return states:

"V.

"That the said William D. Oliver was subpoenaed as a witness before the said Grand Jury and *questioned as to the present status and location* of the said bonds."

VI.

"The the said William D. Oliver gave false and evasive answers *concerning the status of the whereabouts of the said bonds* as follows:

(a) That the said William D. Oliver testified that he had destroyed the said bonds.

(b) That the said William D. Oliver gave false and evasive answers as to the method employed by him in destroying said bonds.

(c) That the said William D. Oliver impeded the progress of the Grand Jury by refusing to give information which would enable the Grand Jury to discover said bonds.

* * * * *

IX.

"That the testimony given by the petitioner and which the grand jury has concluded is false and evasive, is as follows:

(Here follows testimony.)"

From this it is apparent that the sole basis of adjudication by the inquisitor was the alleged falsity of Oliver's testimony as to the disposal of the bonds. Yet half the Michigan Supreme Court finds him guilty of contempt upon a wholly different basis as well, and it is this additional basis, and not the basis on which he was actually convicted by the Circuit Judge, which the Brucker brief stresses.

REVIEW OF FACTS PRESENTED IN BRUCKER BRIEF

Our original brief presented the facts and the law in skeletonized form, with the barest statement of the facts and a concise presentation of the law. We followed this course because we sought a clean-cut issue, confident that a clear understanding was all that was required to enable the court to see the force of our arguments. We dare say that seldom is a brief filed upon a civil rights question which was so totally devoid of rhetoric.

Our reply brief followed the same course.

Yet the Brucker brief charges that we "have gone completely outside the record and have made a host of unsupported statements and indulged in unwarranted inferences derogatory to the one-man grand jury statute."

It then pictures the one-man grand jury system as a beneficent institution which it proceeds to defend. In doing so it is guilty of the very practice it lays at our door. And inevitably an exploration of the alleged facts which it cites in its attempt to justify the Michigan inquisitorial system leads to an exposition of the many vices of that system. This will clearly appear from the review which follows.

* * * * *

The Brucker brief refers to the fact that there exists a special fifteen-man committee to study the workings of the inquisitorial statute. The very fact that such a committee was appointed by the State Bar emphasizes the fact that the procedures of these inquisitors have challenged the attention of thinking persons. Mr. Brucker was the chairman of that committee. His brief is in some respects a re-hash of portions of the report of the majority of the committee. That report was written by him and, while circulated by mail among the members, was never considered at a meeting of the committee.

* * * * *

It is true that at its September convention the State Bar adopted the majority report by a three to two vote, and extended the life of the committee. But it is not true that the committee has since been engaged in study. Not one meeting of the committee has since been held, nor has any assignment of subjects for study been made to its members.

* * * * *

It is true that the inquisitorial statute is simple. But it is also true that this simple statute has been encrusted with procedures and powers which inquisitors have arrogated to themselves so that in its actual working a very complex system has developed.

The statute merely authorizes a judge to take the testimony of a witness if a complaint is filed charging that a crime has been committed and that a witness can give evidence as to it. It was early held by half the Michigan Court that the statute "does not authorize a grand inquest with the power of roving inquiry and presentment of offenders generally."[1] But half the court ruled otherwise. And by this division of the court an inferior judge's ruling upon this vital question became the law for the State.

* * * * *

The State's brief takes occasion to point out that Justice Frank Murphy of this Court acted under this statute. But he acted in conjunction with the officers who by law were charged with the prosecution of crime in his court,—the prosecuting attorney and the corporation counsel. It is a far cry from his day to the present, when the inquisitors choose their own special prosecutors, establish their headquarters in some non-public building, organize a staff of detectives, accountants and investigators, and forsake their judicial duty literally for years at a time. The

[1] *People v. St. John*, 284 Mich. 24.

Brucker brief professes ignorance of this, even denies it is true, but it is a matter of public knowledge, not merely from newspaper reports, but from the fact of participation of such agents in the trials of cases. Let us quote a *friend* of the system:

> "For more than two years Judge Ferguson, assisted by a special prosecutor and staff, devoted his full time to the investigation." (*28 Jl. Am. Jud. Soc.* 142.)

The same author states, with reference to the Carr grand jury, which ran for three years,

> "A special prosecutor heads a staff of some fifteen investigators." (Idem, p. 137.)

And the Michigan Supreme Court has held that, in so acting as a prosecutor, an inquisitor is supreme and is subject to the control neither of the county prosecuting attorney or the state attorney general.[1]

* * * * *

As to whether this uniting of the highest judicial powers and the highest executive powers in one person results in abuses, the readiest authority is the author of what is denominated the State Bar Brief himself. He was also the author of the majority report of the special committee of the State Bar on the inquisitorial system. The report which he drafted recognized and urged the remedying of the following abuses:

(1) The practice by inquisitors, after having ordered a warrant, of insisting upon acting as the examining magistrate to determine whether the accuser was justified in his accusation. This was held by the Michigan Court not to

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[1] *In re Recount*, 270 Mich. 328, 321.

offend the requirements of due process.[1] But the practice was unanimously condemned by the State Bar in convention in 1946, as a result of which condemnation the law, by a draft framed by the Special Committee, was amended to preclude the accuser from presiding over a hearing on his accusation.

(2) The unwarranted assumption of the inquisitor's role by judges.

(3) The use of a witness subpoena as a warrant of arrest and the ensuing unlawful detention of the citizen. (This is a regular practice.)

(4) The use of a subpoena *duces tecum* as a search warrant.

(5) The unnecessary issuance of forthwith subpoenas which are served in the middle of the night when the grand jury is not even in session.

(6) The abuse of the immunity provisions of the statute resulting in witnesses testifying under an assumed complete grant of immunity when this grant is limited only.

(7) The issuance of statements by grand jurors designed to prejudice defendants and for personal or political purposes in disregard of Canons of Ethics.

And it must not be forgotten that the committee has not completed its work and has asked that its life be extended for further study.

To the foregoing list we would add the following which have come to the personal attention of one or another of counsel for the petitioner:

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[1] *People v. McCrea*, 303 Mich. 213, 248.

(1) The failure to advise witnesses of their constitutional rights. In the early days such advice was given scrupulously; now it is carefully avoided.

(2) Summoning a wife and questioning her about the activities of her husband.

(3) Refusing the witness the right to consult with his lawyer before answering.

(4) Warning a witness that because of the statutory injunction of secrecy he must not consult with his lawyer between periods of questioning.

(5) The abuse of the contempt powers, as exemplified by the instant case.

(6) The denial of a full hearing on appeal, as exemplified by the instant case.

* * * * *

The device of presenting the names of the individuals who through the years have been members of a court as an argument for sustaining a decision of that court is a novel one. It has never before been resorted to in the combined experience of the counsel for the petitioner. It is unfortunate that the State Bar was driven to the extremity of resorting to such an argument. It is embarrassing to us to be called upon to answer it. Yet we cannot run away from the challenge. The following facts, taken from the decisions of that court on matters involving the inquisitorial statute, afford a complete answer:

I.

When the question of whether an inquisitor acted judicially first came before the court[1] that important question was disposed of with the following terse pronouncement:

[1] *Mundy v. McDonald*, 216 Mich. 444.

> "That defendant acted in a judicial capacity cannot, we think, be questioned. What he did he did as a Circuit Judge."

Note that neither logic nor authority is presented to justify the decision.

II.

When the constitutionality of the statute first came before the court,[1] it was sustained by an opinion of half the court with the following bald announcement:

> "This objection is answered by the case of *Mundy v. McDonald*, 216 Mich. 444, where we said:
>
> 'That defendant acted in a judicial capacity cannot, we think, be questioned. What he did he did as a circuit judge.'"

Again no logic, again not a single citation on Constitutional Law.

This pronouncement of *half* of the court was thereafter accepted as the law in Michigan.

III.

The constitutionality of the statute was again presented in *In re Slattery*, 310 Mich. 459. There the court gave earnest consideration to the objection that the statute imposed non-judicial duties on a judge in violation of the Constitution. It decided that important constitutional question, however, without citing in its support a single case on Constitutional Law. And it chose to ignore a second objection to the constitutionality of the act,—that if the inquisitor acts in a judicial capacity, then the statute is void as conferring judicial powers on a *judge* instead of upon *courts only*, as the Constitution ordains.

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[1] *People v. Doe*, 226 Mich. 5.

IV.

The constiutionality of the statute was again challenged in *Kloka v. Brake*, 318 Mich. 87, and this second objection to the constitutionality of the Act was again briefed and argued and again ignored by the court in its opinion.

V.

The question that is now before this court was presented to the Michigan Supreme Court in *In re Slattery*, 310 Mich. 459, in almost the exact form and with the same authorities heretofore presented to this court. And the Michigan Supreme Court totally ignored the proposition.

VI.

In *In re McCarthy*, 294 Mich. 368, McCarthy, a police officer, was sentenced to five days imprisonment for "Contempt of Court" on Thursday, August 29, 1939. His sentence terminated with Labor Day. It was physically impossible to comply with Michigan court rules and obtain leave to appeal to the Supreme Court within the five day period of his imprisonment, even had no week-end and holiday been a part of his period of imprisonment. He was then suspended from the police force. The inquisitor, Judge (now Senator) Ferguson denied him a transcript of his testimony as a basis of an application for leave to appeal on the ground it was secret and he had no right to disclose it. The Michigan Supreme Court sustained this denial upon the ground that the question was moot, despite the fact that the conviction had cost McCarthy suspension from his employment, and the loss of the benefit of years of service.

VII.

In *In re Slattery*, 310 Mich. 459, the Circuit Judge also refused to furnish the witness' testimony as a basis of

an application for leave to appeal. Slattery then applied to the Michigan Supreme Court for Habeas Corpus and Certiorari. Certiorari was granted explicitly limiting the judge's return to the proceedings in *court*, so as *not* to bring before the Supreme Court Slattery's testimony before the inquisitor. The inquisitor accordingly made a formal return of his order of commitment and nothing more.

On his own motion, however, the Circuit Judge later made a further return in which he set forth portions of Slattery's testimony and indicated omissions therefrom by asterisks. He then added "that from substantial evidence previously submitted to the Grand Jury," (Slattery record, p. 17)[1] there was reason to believe that Slattery had talked with a certain legislator and "that Slattery recalled the incident."

In other words, Slattery had been convicted by the inquisitor upon the testimony of a witness with whom he was not confronted!

Slattery's counsel asked that the complete record be returned to the Supreme Court stating (Slattery record, page 25):

> "And while we feel that this transcript should be available to us for the purpose of argument, we are willing, if this court does not agree with us, that the transcript be returned to the court for its inspection in confidence and, if necessary, even without submitting it to us."

This proposition was disposed of by the statement:

> "Petitioner was not entitled to a full inspection of the examination by the Grand Jury"

[1] The record in the Slattery case is on file in this court

with the citation of two cases which hold that defendants on trial for crimes were not entitled to access to grand jury testimony.

VIII.

Again in the instant case there was a denial of a hearing on appeal on the full record upon which the conviction was based.

IX.

Finally, we point out that the Michigan Supreme Court has perversely held to its pronouncement that an inquisitor acts in a judicial capacity without a single authority in support of its position and in the face of the contrary authorities heretofore submitted to this court, these having been presented to the court in the Slattery and Kloka cases, *supra*.

* * * * * 7

Such is a partial review of the record of the Michigan Supreme Court in dealing with questions arising under the inquisitorial statute. Upon that record the court must be judged. Neither can words of severe condemnation, on the one hand, accentuate, or of subservient adulation on the other, minimize, the force of that record. Some might say that that record reflects a careless indifference to the right adjudication of fundamental issues. To us, however, it reflects the fact that the court has an impossible task in trying fully to study and properly to adjudicate the innumerable issues that are presented to it. For the Michigan Supreme Court is the only appellate court in that state and it has for years been obvious that its judges are overworked.

CONCLUSION

The attorneys for the petitioner are not opposed to a one-man inquisitorial system. We recognize that a one-man grand jury does have certain advantages over a twenty-three-man grand jury. What we object to is the drafting of a member of the judiciary to take charge of one of the most important responsibilities of the Executive Department of the Government with the consequent lack of restraint by the judiciary upon such activities of the Executive Department.

We believe with Montesquieu that "There can be no liberty * * * if the power of judging be not separated from the legislative and executive powers," and that "Were the power of judging * * * joined to the executive power the judge might behave with all the violence of an oppressor."[1]

We believe that the workings of the Michigan Inquisitorial System, as now formulated, has furnished repeated examples of the accuracy of that observation.

The peculiar advantage in procedure which the Michigan Inquisitorial Statute introduced, is the power of the Inquisitor to grant immunity. No such power was theretofore reposed in any official in the State. Therefore, until the adoption of the Statute, if a witness stood upon his constitutional rights, the inquiry was ended. Now it may not be thwarted by a witness taking such a position.

There is no reason why the same power cannot be reposed in the County Prosecutor and in the State Attorney General, or at least that the authority be given to them to request an order of immunity from a judge. Armed

[1] Quoted in *Searle v. Yensen*, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257.

with this advantage we believe the prosecutor could operate as a one-man grand juror just as effectively as could any circuit judge who was willing to confine his activities within legal bounds.

But if we are in error in this, and if it is a question of some guilty persons escaping prosecution or of the continuance of the flagrant violations of rights that have occurred in the past, then we are in favor of the accused going free, rather than of our judges continuing to be guilty of betrayals of their oaths of office.

In the instant case the Answer to the Writ of Habeas Corpus filed by the Circuit Judge is specific as to the basis of the judgment of contempt. It states that "Oliver gave false and evasive answers concerning the status of the whereabouts of the said bonds" * * * and "that the said William D. Oliver impeded the progress of the grand jury by refusing to give information which would enable the grand jury to discover said bonds" (91).

This clear statement leaves no room for conjecture as to the basis of Oliver's conviction. Therefore the gratuitous arguments of the Brucker brief that Oliver was guilty of false testimony other than that which was the basis of his conviction, scarcely comports with the responsibility of fairness and impartiality which a brief *amicus curiae* assumes. Upon the other hand, the hollowness of the circuit judge's charge that "Oliver impeded the progress of the grand jury by refusing to give information which would enable the grand jury to discover the said bonds," and this is the only impeding of the administration of justice laid to Oliver, is exposed by the fact that it is unchallenged that Oliver, during his testimony, identified a copy of the bond which he had purchased.

The instant case is thus exposed as one of those cases where the grand juror "assumed that the power existed to

hold a witness in confinement under the punishment until he consented to give a character of testimony which, in the opinion of the court, would not be perjured," and is a glaring example "of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based, were not promptly corrected." *In re Hudgings*, 249 U. S. 378, 63 L. Ed. 656.

The situation which has prevailed in Michigan for more then twenty years which permits the head of a secret tribunal to clap a citizen into jail whenever he does not like his testimony and deny the citizen a trial on the charge laid against him, suggests a forgetfulness of those pernicious practices, the necessity of abolishing which has given rise to the enunciation of many of our basic principles of civil rights. Those who have thus become forgetful may read with profit the historical review presented in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, 821:

> "The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne, in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions of confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an *inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner*, and to entrap him into fatal

contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment." (Italics ours.)

Respectfully submitted,

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FILE COPY

In the Supreme Court of the United States

October Term 1947

No. 215

In the Matter of William Oliver, Petitioner.	On application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

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In the Matter of William Oliver, Petitioner.	On application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

I

Reference to official report of opinions delivered in court below.[*]

The prevailing (22-28) and 'dissenting' (28-32) opinions delivered in the court below,[1] are officially reported 'In the Matter of William Oliver', 317 Mich. 7.

The prevailing and 'dissenting' opinions delivered in the

[*] Unless otherwise plainly indicated by the context, numbers in parentheses refer to pages of the printed record.

[1] Culminating in an order (32) dismissing a writ of habeas corpus and an ancillary writ of certiorari to inquire into the legality of petitioner's summary conviction (15) of contempt of court.

court below 'In the Matter of Hartley' (a companion case) are officially reported in 317 Mich. 441.[2]

II

Counter-Statement Concerning Jurisdiction.

Counsel for petitioner urge (p. 3) that his 'summary conviction . . . of contempt of court . . . was a denial' of due process guaranteed by the 14th Amendment; and they invoke the jurisdiction of this Court under § 237 (b) of the Judicial Code as amended (28 USC § 344 [b]).

Our position, concisely stated, is that such a denial of due process was not claimed in the petition (2) for habeas corpus filed in the court below;[3] that all questions, however raised, drawing into the controversy the matter of 'due process', were answered by the court below in construing local legislative enactments; that members of the court below expressed contrary opinions relating to inferences to be drawn from the testimony which petitioner gave before the grand jury (whether it was evasive or frank and candid); and that substantial nonfederal grounds underly the decision of the Michigan Supreme Court. There is, therefore, we suggest, a reasonable doubt of this Court's

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[2]

In each case members of the court divided equally, 4-4, on the question whether 'the record showed . . . evidence of falsifying' testimony or 'evasive' replies to questions asked the petitioner when called as a witness before a 'one-man grand jury'.

[3]

While it appears from the opinion (26) of the Chief Justice (which prevailed) that in the brief filed on behalf of petitioner it was contended, inter alia, that his conviction violated the due process clause of the 14th Amendment, but opinion itself discusses a controlling nonfederal question.

jurisdiction under § 237 (b) of the Judicial Code, as interpreted in Court Rule 38.

III

Counter-Statement of the Case.

We respectfully note the following inaccuracies and insufficiencies in the petition for certiorari and counsel's supporting brief:

1. It is insufficient to say, as counsel do (p. 7), that the circuit judges deemed petitioner's testimony (10-14) '*untruthful*', for they also held it (9) '*evasive*'; and the prevailing opinion (22) delivered in the court below by Mr. Chief Justice Carr, as well as the prevailing opinion delivered by Mr. Justice Dethmers in the companion case of Hartley (p. 16), dwelt largely upon the fact that the testimony of each witness was '*evasive*' rather than upon the finding that it was 'untruthful'.[4]

2. In the petition for certiorari (p. 5), under the captions 'How Questions Raised' and 'Reasons for Allowance of Writ', there are many 'off-the-record statements' reflecting somewhat more heat than light. Reference to 'scores of Michigan citizens' who 'have been summarily convicted of

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[4]

This would seem important to consider in determining jurisdiction. If the sole question decided by the circuit judges was whether petitioner's testimony was 'untruthful', it might strongly be urged that without due notice followed by a hearing at which it would be incumbent upon the judges to establish the fact of perjury by countervailing proof, due process would be denied. If, however, the petitioner's answers given in the presence of the judges, were evasive and unresponsive, due process would not be denied in summarily adjudging him guilty of contempt.

contempt of court, even though they have never been before a court, by judges acting as one-man grand jurors', who 'do this without restraint', and to the practice of the Michigan Supreme Court in reviewing such orders, is wholly gratuitous.[4a]

3. In their summary of facts counsel assert (p. 7) that petitioner contended in the court below that his imprisonment was 'a denial of due process'. 'That court', it is correctly said, 'by a four-to-four decision sustained his conviction, one half holding there was contempt and the other half holding there was no contempt'. But they are mistaken when they intimate (p. 8) that the questions raised were considered in their federal aspect or decided by applying federal tests of due process. All of which appears from the following:

(a) The petition (2-4) for writ of habeas corpus (drafted by a lawyer) does not allege any violation of rights guaranteed by the Fourteenth Amendment. On the contrary, after reciting the facts, petitioner's attorney stated (3) that the illegality of petitioner's confinement consisted 'in this, to wit', and he set forth five grounds on which he based his prayer for relief.[5] But he did not aver that the procedure

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[4a]

To say, as counsel do, that a Michigan circuit judge who sits as a one-man grand jury (Mich. Comp. Laws 1929, §§ 17215-17220 [Mich. Stat. Ann. §§ 28.941-28.946]) performs no judicial function, and that he is not a court, runs contrary to established Michigan law. In re Slattery, 310 Mich. 458; certiorari denied, 325 U.S. 876.

[5]

Such grounds when summarized amount to this: (a) that petitioner was not guilty of contempt; (b) that no formal order was signed on the day he was incarcerated (though it was later); (c) that his conduct did not evince contempt; (d) that he was denied the benefit of counsel (a question not decided below or pressed here); and (e) that he was not confined by virtue of any legal commitment as required by Michigan law.

of the circuit judges violated the due process clause of the Fourteenth Amendment to the Federal Constitution.

(b) The prevailing opinion (22) delivered below notes (26) that in the brief filed on his behalf petitioner contended that his summary conviction of contempt constituted a denial of due process and hence a violation of the Fourteenth Amendment,[6] and that contemptuous behavior toward a grand jury conducting a statutory investigation,[7] was not contempt of court. But it does not discuss the federal question, merely holding that it possesses no merit by virtue of the opinion of Mr. Justice Dethmers delivered in a companion case.[8] And the Chief Justice then proceeds to consider the controlling question in the case, 'whether, as a matter of fact, plaintiff was guilty of contempt of court', holding that 'an examination of the testimony given by Oliver (the petitioner) with reference to his dealings with Mitchell leads to the conclusion that plaintiff sought to withhold his real reason, or reasons, for paying money to Mitchell, ostensibly for the bonds'. 'It is apparent', the Chief Justice continues (27), 'that for some reason he did not wish to disclose to the grand juror the precise nature of his dealings with Mitchell. His evasive replies clearly tended to obstruct the investigation and were in consequence contemptuous in character. It is scarcely conceivable that

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[6]

Such denial, it was argued (26), consisted of a failure to file charges, give the accused notice of hearing, and a hearing thereon. The answer was that petitioner was guilty of contemptuous conduct in the immediate presence of the court.

[7]

Under the Michigan 'one-man grand jury law'. Michigan Code of Criminal Procedure, chap. 7, §§ 1-6 (3 Comp. Laws Mich. 1929, §§ 17215-17220 [Mich. Stat. Ann. §§ 28.941-28.946]).

[8]

In re Hartley, 317 Mich. 441; also published on pp. 16 et seq., petition for certiorari and supporting brief.

plaintiff did not know the real reason why he took these so-called bonds from Mitchell, and paid money to the latter'.[9]

Three other justices joined with the Chief Justice in signing (28) the foregoing opinion.

(c) Mr. Justice North, with whom three associates concurred (32), wrote an opinion (28-32) to the contrary, holding that on the record before them, which did not contain testimony by plaintiff which was evasive or which showed he falsified, 'our conclusion is that plaintiff was unjustly committed for contempt of court', and for that reason the judgment entered in the circuit court should be vacated. In this opinion, the precise issue was defined (28) as follows:

> "Hence the scope of our review is this: Is there any competent evidence in the record in support of the finding below that when plaintiff was testifying he gave answers which were (1) evasive or (2) false?"

(d) As heretofore stated, the prevailing opinion delivered below refers to the opinion of Mr. Justice Dethmers in the companion case of *Hartley* (317 Mich. 441).

That opinion notes that plaintiff, Hartley, urged that his sentence for contempt (during the course of the same investigation) was illegal on the ground, *inter alia*, that due process had been denied. In this regard Mr. Justice Dethmers held that such questions of due process were directed to the same general question of the right of the judge, 'under the circumstances here presented, to summarily adjudge one

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[9]

It is a fair inference, to be drawn from the entire record, that the circuit judge, acting as a one-man grand jury, assisted by two brother judges, was investigating to determine whether there was cause to charge Mitchell with some species of extortion.

guilty of contempt without filing of charges, notice and hearing thereon' (petition for certiorari, p. 19). And held: (1) that in conducting a so-called one-man grand jury investigation (under Michigan law), a circuit judge acts in a judicial capacity;[10] (2) that the Michigan Supreme Court has previously upheld the power of a circuit judge, acting as a one-man grand jury, to punish summarily for contempt;[11] and (3) that plaintiff's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. 'It was', said the Justice, 'direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided in' Michigan law.[12]

(e) The contra opinion (petition, pp. 27-29) written by Mr. Justice Boyles in the companion case of *Hartley*, while commenting on the fact that Hartley 'was without counsel', and that he was summarily sentenced 'to 60 days in the county jail for alleged contempt of court', nevertheless turned on the question whether one could 'infer from the testimony . . . that Hartley was giving evasive or false answers', an inference which Mr. Justice Boyles and three of his associate justices were unable to accept. And he closes his opinion with the following:

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[10]

Citing Michigan authority: Mundy v. McDonald, 216 Mich. 44; In re Slattery, 310 Mich. 458 (certiorari denied, 325 U.S. 876).

[11]

Likewise, on the authority of Michigan decisions: People v. Wolfson, 264 Mich. 409; In re Cohen, 295 Mich. 743; and In re Slattery, supra, footnote 10.

[12]

Citing: 3 Comp. Laws Michigan 1929, § 13912 (Mich. Stat. Ann. § 27.513); 3 Comp. Laws Michigan 1929, §§ 13910-13911 (Mich. Stat. Ann. §§ 27.511-27.412). In re Emery T. Wood, 82 Mich. 75.

"Inasmuch as the record does not contain any evidence tending to support the finding of evasiveness or untruthfulness in the answers given by plaintiff, the order of his commitment under which he technically is still in custody is hereby vacated" . . . (petition, p. 29).

IV

The Argument.

Point One

Decisive, substantial, nonfederal grounds underlie and sustain the order of the court below.

We respectfully suggest several cogent reasons to doubt jurisdiction under § 237 (b) of the Judicial Code as amended, which in view of the foregoing counter-statement of the case may be somewhat hastily summarized:

1. Determination of jurisdiction is controlled by Hornbook rules of law familiar to the Court.

(a) The decision of a state supreme court is considered binding on this Court insofar as state law and its interpretation or construction are concerned.[13]

(b) The Court will decline jurisdiction to review a state court decision unless it appears affirmatively not only that a federal question was presented for decision but that the state court's decision of the federal question was necessary to determination of the cause, that the federal question was

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[13]

A., T., & S. F. R'y Co. v. California, 283 U.S. 380; Sages Stores Co. v. Kansas ex rel. Mitchell, 323 U.S. 32; Williams v. Kaiser, 323 U.S. 471.

actually decided, or that the judgment as rendered could not have been given without deciding it;[14] and the Court will examine the opinion of the state court to ascertain whether a federal question was raised and decided, and whether the state court rested its judgment on adequate nonfederal grounds.[15]

(c). The Court has dismissed a writ of certiorari where the state court's decision rested on a nonfederal ground, notwithstanding the latter's unnecessary discussion of a constitutional question,[16] and it will not review a state court decision resting on adequate and independent nonfederal ground, although the decision also rests upon an erroneous view of federal law.[17] The question for determination is whether a nonfederal ground independently supports the judgment of the state court.[18]

(d) And finally there is the maxim that a State may control its criminal procedure 'in accordance with its own idea of the most efficient administration of criminal justice',[19] with which this Court will never interfere unless

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[14]
S.W. Bell Telephone Co. v. Oklahoma, 303 U.S. 206.

[15]
State of Indiana ex rel. Anderson v. Brand, 303 U.S. 95.

[16]
Geo. O. Richardson Machine Co. v. Scott, 276 U.S. 128.

[17]
Radio Station WOW v. Johnson, 326 U.S. 120.

[18]
Able State Bank v. Weaver, 282 U.S. 765.

[19]
Adamson v. California, No. 102 October Term 1946, decided June 23, 1947; slip opinion, p. 10.

there is a manifest infringement of some fundamental right or privilege guaranteed by the Federal Constitution or its Amendments.[20]

2. The only reference throughout the entire record to the Constitution of the United States,[21] is found in the opinion (22-28) of Michigan's Chief Justice, who said (26):

> "In the *brief* (our emphasis) filed on behalf of plaintiff it is contended, first, that plaintiff's summary conviction of contempt constituted a denial of due process of law and hence violated art. 2, § 16, of the State Constitution, and § 1 of the Fourteenth Amendment to the Federal Constitution; second, that due process of law, under both the State and Federal Constitutions, required the filing of charges, notice of hearing to the accused, and a hearing on such charges; third, that contemptuous misbehavior toward a grand jury conducting an investigation under the statutory provisions above cited is not contempt of court".

The Chief Justice then noted that in a similar companion case decided April 17, 1947,[22] the foregoing questions were all raised and discussed at some length by Mr. Justice

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[20]

Palko v. Connecticut, 302 U.S. 319, 325.

[21]

Again, it may be noted for what it is worth, that petitioner did not in his application for habeas corpus claim a violation of rights guaranteed by the Federal Constitution.

[22]

In re Hartley, 317 Mich. 441. See petition, p. 16 et seq.

Dethmers in his opinion,[23] 'and', he said, 'it is unnecessary to repeat what was there said. The claims made are without merit' (26).

It is therefore important to observe that in the companion case of Hartley, *supra*, Mr. Justice Dethmers did not apply federal tests to given premises in order that he might determine whether petitioner's liberty had been taken without due process of law. The effect of his decision was to hold that *under Michigan law as construed by him*, the circuit judge had power and authority, 'under the circumstances here presented, to summarily adjudge one guilty of contempt without filing of charges, notice and hearing thereon'.[24] The circuit judge, in other words (p. 20), 'while acting as a one-man grand jury may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith'.

> "Plaintiff's contempt (he continued), if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided *(by*

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[23] The conviction of Hartley for contempt, committed under circumstances analagous to those in the case at bar, and during the same grand jury investigation, was sustained by an evenly divided court whose members disagreed on the inferences to be drawn from the testimony of the witness.

[24] Such a circuit judge acts in a judicial capacity, the justice noted on authority of Mundy v. McDonald, 216 Mich. 44, and In re Slattery, 310 Mich. 458; certiorari denied, 325 U.S. 876. And he observed that the court had previously upheld the power of a circuit judge to punish summarily for contempt. People v. Wolfson, 264 Mich. 409; In re Cohen, 295 Mich. 743.

Michigan law).[25] It was properly dealt with summarily".[26]

3. Mr. Justice Dethmers then proceeds to the core of the problem and asks (pp. 20-26) the question (p. 20):[27] 'Was plaintiff (Hartley), in fact, guilty of contempt?'[28] A question which he answers with an emphatic affirmative, stating among other things:

> "No more graphic demonstration of frantic flight from one untenable position to another could be imagined. . . . Plaintiff's answers were obvious attempts to fob off inquiry; they were evasive and inconsistent; they reveal a manifest desire and attempt to conceal plaintiff's real reason for purchasing the bonds; they amount to sham, fully as effective in thwarting proper inquiry by the court as an absolute refusal to answer questions at all".[29]

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[25]

3 Comp. Laws 1929, § 13912 (Stat. Ann. § 27.513).

[26]

Under Michigan law: citing 3 Comp. Laws 1929, §§ 13910-13911 (Stat. Ann. §§ 27.511-27.512); In re Emery T. Wood, 82 Mich. 75.

[27]

These parenthic references to the opinion of Mr. Justice Dethmers, refer to pages of the petition for certiorari.

[28]

The opinion was based upon the following established principle of Michigan law: 'The return (to certiorari) must be taken as true. . . . We may and it is our duty to examine the testimony to see if there is any evidence to support the finding. If there is we cannot measure it'. People v. Doe, 226 Mich. 5.

[29]

Citing: United States v. Appel, 211 Fed. 495-6, where it is said: 'If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry'.

4. The prevailing opinion of the Chief Justice in the case at bar is equally emphatic in determining (26-28) that Oliver, the petitioner, sought to *withhold* the truth; that the grand juror and his associates were fully justified in concluding 'that Oliver was 'intentionally evasive'.

> "What was said by Justice Dethmers in the Hartley case, *supra,* with reference to testimony of Hartley, may well be applied to the statements of Oliver. It is apparent that for some reason he did not wish to disclose to the grand juror the precise nature of his dealings with Mitchell. His evasive replies clearly tended to obstruct the investigation and were in consequence contemptuous in character".

And he held (27) that, since the circuit judges had the advantage of hearing plaintiff's testimony and of noting his demeanor in giving it, 'the conclusion reached finds support in the record'.

5. As heretofore stated, eight justices of the court below divided equally on the major question involved and the judgment was sustained. The devisive and decisive question was whether 'there was any competent evidence in the record in support of the finding below that when plaintiff was testifying he gave answers which were (1) evasive or (2) false' (opinion of Mr. Justice North, 28). And the substance of the 'dissenting' opinions, as expressed by Mr. Justice North in the present case (32), was that

> "on the record before us, which does not contain testimony by plaintiff which was evasive or which showed he falsified, our conclusion is that plaintiff was unjustly committed for contempt of court".

Or, as stated by Mr. Justice Boyles in *Hartley* (p. 28):

> "I am not able to infer from the testimony, as quoted by Mr. Justice Dethmers, that Hartley was giving evasive or false answers, as found by the sentencing grand juror".

Not one of the 'dissenters'[30] held as a matter of law that the petitioner (Oliver) or the plaintiff (Hartley) had been deprived of his liberty without due process of law as guaranteed by the Fourteenth Amendment.

Point Two

Thus it appears that the questions presented in the petition for certiorari, rest on false premises.

In view of the foregoing considerations (Point One), the three questions presented by petitioner may receive summary answers.

> 1. 'Is it a denial of due process to convict one of contempt of court summarily and without trial when the alleged misconduct is not committed in open court?' (petition, p. 4; argued pp. 8-10 *idem.*).

The short answer is that in this particular case, the alleged misconduct *was* committed in open court. It was committed in the presence of circuit judges acting in a judicial capacity while conducting a grand jury investigation pursuant to Michigan law interpreted by the highest court of the State *(In re Slattery, supra)*.

> 2. Even assuming a witness has testified in open court, is it a denial of due process to convict him of

[30] The word is used for lack of a better term.

contempt of court summarily and without trial for alleged false testimony, where the falsity of such testimony, is not self-evident?' (petition p. 4; argued pp. 10-11).

Counsel recognizes 'that where the falsity of testimony is self-evident, a summary conviction may follow (e.g., *U.S. v. Apel*, 211 Fed. 495)'. But he urges that where evidence is required to establish the falsity of testimony then due process requires a notice and a hearing. That is correct, but again the premises are false.

Petitioner's offense did not consist of 'false testimony', for the court below found sufficient evidence to establish the fact that his answers were evasive; that they 'fobbed off' inquiry; and that therefore his conduct in the presence of the judges was contemptuous, as contemptuous as though he refused to answer the questions propounded.

3. 'Is it a denial of due process summarily to convict one of contempt of court by reason of alleged perjury before a one-man grand jury?' (petition p. 4; argued, pp. 11-12).

This case is readily distinguishable from *In re Michael*, 326 U.S. 224; there, alleged false testimony was given by a witness before a federal grand jury convened pursuant to the laws of the United States; and this Court held that false testimony before a grand jury does not obstruct the judicial process and may not therefore be the basis of a conviction of contempt of court. Here, evasive answers were made by a witness called upon to testify before a circuit judge sitting as a one-man grand jury under a law of the State of Michigan. As interpreted by Michigan's highest court,

that law is held to mean that *such a grand jury investigation* calls for exertion of judicial power, and that evasive answers so given constitute contempt of court.

V

Conclusion.

We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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FILE COPY

No. 215

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

IN THE MATTER OF WILLIAM OLIVER,
PETITIONER.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE STATE OF MICHIGAN

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IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE STATE OF MICHIGAN

I

Opinions Below

The opinions delivered in the court below are officially reported: *In re Oliver*, 318 Mich. 7

Opinions delivered in the court below in an earlier and correlated case that presented identical questions, are officially reported: *In re Hartley*, 317 Mich. 441. [1]

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[1] In each case the opinions of an equally divided court resulted in an order dismissing writs of habeas corpus and ancillary certiorari, and in affirming a summary conviction of contempt of court committed by a witness when testifying before a Michigan circuit judge acting as a one-man grand jury pursuant to the Michigan Code of Criminal Procedure, chapter 7, § § 3-6, incl., Mich. Comp. Laws 1929, § § 17217-17220, Mich. Stat. Ann. § § 28.943-28.946.

II

Jurisdiction

In our brief opposing the petition for certiorari, we suggested a few reasons for doubting jurisdiction under § 237 (b) of the Judicial Code, 28 U.S.C. § 344 (b), but since the Court has granted the writ, we assume the question is foreclosed.

III

Concise Statement of the Case[2]

Since counsel has informed us he will probably stand on his brief in support of the petition for certiorari, we make such statement as we deem necessary to correct the following insufficiencies and inaccuracies therein:[3]

1. Counsel states, p. 7, that 'a Michigan statute constitutes a circuit judge an Inquisitor with powers similar to a grand jury', and he has dubbed this law, pp. 14-16, the 'Michigan Inquisitorial Statute'.[4]

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[2] When this brief was written we had not yet received copies of the printed transcript of the record; therefore, unless otherwise plainly indicated, numbers in parentheses refer to pages of the original printed record.

[3] Supreme Court Rule 27 (4).

[4] The opponents of Michigan's one-man grand jury system, refer to the proceedings as an 'Inquisition' and to the one-man grand jury as the 'Inquisitor', using such terms in their medieval sense, but we must assume that counsel employs them as commonly understood.

Since that 'statute' as applied and construed by Michigan's highest judicial authority, [5] is the focal point of this controversy, it is considered essential to a plain understanding of the question involved, [6] that these four sections of Michigan's code of criminal procedure be clearly explained.

Section 3 of chapter 7 of the Michigan Code of Criminal Procedure,[7] authorizes a circuit judge 'whenever . . (he) shall have probable cause to suspect that any crime . . shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense', to 'require such person to attend before him as a witness and answer such questions as such . . . judge may require concerning any violation of law about which he may be questioned'.[8]

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[5]

This law has been interpreted, construed and applied by the Michigan Supreme Court on numerous occasions, inter alia: People v. Doe, 226 Mich. 5; In re Petition for Investigation of Recount, 270 Mich. 328; In re Slattery, 310 Mich. 458; certiorari denied, 325 U. S. 876.

[6]

The federal question in essence is whether a circuit judge denies due process in summarily adjudging a witness guilty of contempt because he has given evasive testimony during a one-man grand jury inquiry.

[7]

Mich. Comp. Laws 1929 § 17217; Mich. Stat. Ann. § 28.943.

[8]

It is then provided, id. § 4, as amended by Act No. 33, Pub. Acts 1947, that if upon such inquiry the judge 'shall be satisfied that any offense has been committed, and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process'. The 1947 amendment did not change this language, but added a proviso that such judge is disqualified from acting thereafter in the matter.

Section 5 thereof[9] provides in part:

> "Sec. 5. Any witness neglecting or *refusing* . . . . *to answer any questions* which such . . . judge may require material to such inquiry, shall be deemed guilty of a contempt". . .[10]

And section 6,[10a] recognizing the State constitutional guaranty of privilege against self-incrimination,[10b] provides that no witness shall be required to answer any questions the answers to which might tend to incriminate him unless under the formula therein prescribed,[10c] he is first granted immunity.[11]

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[9]

Mich. Comp. Laws 1929 § 17219, Mich. Stat. Ann. § 28.945.

[10]

The italicized words 'refusing to answer any questions' has been judicially construed to include an evasive answer as tantamount to a refusal to answer. In re Slattery, 310 Mich. 458, certiorari denied, 325 U.S. 876. See Slattery v. MacDonald, 151 F. 2d 326, certiorari denied, 326 U.S. 787, rehearing denied, 327 U.S. 814.

[10a]

Mich. Comp. Laws 1929 § 17220, Mich. Stat. Ann § 28.946.

[10b]

Mich. State Const. 1908, article 2, § 16.

[10c]

Such formula reads: 'Sec. 6. No witness shall . . . be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such judge, and any such questions and answers shall be reduced to writing and entered upon the journal of such judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense which such answers may have tended to incriminate him'.

[11]

Under a recent decision of the Michigan Supreme Court, People v. Hoffa, In re Prujansky, 318 Mich. 656, this section protects a witness whose testimony before a one-man grand jury might tend to incriminate him in a federal court.

For the further information of the Court we publish as Appendix A, *post*, pp. 29-40, a summary of Michigan's criminal procedure under her one-man grand jury law, relating something of its history, [12] and stating the main purposes for which it has been utilized.[12a]

We deem it important to add that in 1947 a special committee of 15 members appointed by the Michigan State Bar (an organization of all practicing attorneys not to be confused with the Lawyers Guild in whose behalf a brief *amicus curiae* will probably be filed)[13] to study and report upon the Michigan one-man grand jury law, recommended *inter alia* that such law 'should, with certain appropriate amendments, remain a part of the system of criminal jurisprudence of the state of Michigan'.[14] This majority report was signed by 12 members of the committee, while three members signed a minority report. The majority report was

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[12]

From this it will be seen that the Michigan one-man grand jury law, originally enacted as Act No. 196, Pub. Acts 1917, was passed by the legislature on recommendation of a special committee of the Michigan Bar Association.

[12a]

In general this law is used for the discovery of widespread criminal conspiracies involving public officials who have proved recreant to their trust. People v. McCrea, 303 Mich. 213; People v. Delano, 318 Mich. 557.

[13]

The Michigan State Bar, of which every practicing lawyer in the state is required by law to belong and to sustain, was created by Act No. 58, Pub. Acts 1935; Mich. Stat. Ann. § 27.101 et seq.

[14]

This report, together with that of the minority, is published in the September 1947 issue of the Michigan State Bar Journal, p. 55 et seq., available in the Library of the Supreme Court of the United States.

adopted at the annual meeting of the Michigan State Bar in 1947.[15] It will we hope prove informative.

2. In the petition for certiorari, p. 5, there is an off-the-record reference to scores of Michigan citizens who, it is said, 'have been summarily convicted of contempt of court, even though they have never been before a court, by judges acting as one-man grand juries'; and in the brief that follows, counsel state, p. 7, '*At no time, however, was he ever in the presence of a court*' (the italics are those of counsel).

Counsel is mistaken for it is now established Michigan doctrine that a circuit judge who by virtue of the foregoing provisions of the State Code of Criminal Procedure conducts a one-man grand jury inquiry 'is acting in a judicial capacity'.[16]

3 It is insufficient to say, as counsel states, p. 7, that the circuit judges 'deemed his (petitioner's) testimony *untruthful*', for the judge who acted as a one-man grand jury also considered such testimony '*evasive*' (9), and the prevailing opinion in *Oliver*, 318 Mich. at 14, as well as the prevailing opinion in *Hartley*, 317 Mich. at 448-451, emphasized the 'evasive' rather than the 'untruthful' character of the answers of each witness.

4. Counsel also states, p. 7, that petitioner having been given 'into the custody of the sheriff', 'He was then denied

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[15] Michigan State Bar Journal, November 1947 issue, p. 32.

[16] In the case of Slattery, the Michigan Supreme Court, after citing about 11 of its decisions involving one-man grand jury proceedings, said: 'So that there may be no further question, we hold that the judge conducting a one-man grand jury proceeding is acting in a judicial capacity.' In re Slattery, 310 Mich. 458, at 467; certiorari denied, 325 U.S. 876.

the right to consult counsel' (3). But this claim of denial of counsel apparently was not urged in the court below; it is not mentioned in the opinions; and it does not appear among the reasons assigned for allowance of the writ of certiorari, pp. 5-6; nor is the question of denial of counsel raised in petitioner's brief.

5. Finally it is said, p. 7, that petitioner was questioned by the circuit judges in secret chambers[17] 'as to the purchase and disposal of certain bonds', but this over-simplifies the matter.

The facts as set forth (8-15) in the circuit judge's return to the ancillary writ of certiorari issued by the court below, are correctly summarized (22-26) in the prevailing opinion in the court below, 318 Mich. 9-12:

> "The return sets forth that, in the course of the investigation referred to,[18] it was called to the attention of the circuit judge, acting as a grand juror, that plaintiff (Oliver) was the owner of certain pin ball machines which were being operated in Oakland county, and which, it was suspected, were being used for gambling

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[17] It is, of course, no novelty to conduct a grand jury proceeding in secret.

[18] The investigation conducted by the one-man grand jury involved (22) 'alleged violations of the statutes of the State pertaining to gambling, operation of gambling devices, bribery of public officials, and other offenses' (8).

purposes;[19] and that plaintiff had purchased from one C. A. Mitchell, doing business as the Midwest Bonding Company, a series of instruments referred to as 'bonds', for which plaintiff had paid certain sums of money. The return further shows that Oliver was questioned before the grand jury concerning his dealings with Mitchell, and also as to the location of the bonds in question''.[20]

There follows (23-26), in the opinion, 318 Mich. 9-12, that portion of petitioner's testimony which the circuit judge (one-man grand jury) and his associates concluded was false and evasive. And the court below proceeds to consider, id., p. 13, 'whether, as a matter of fact, plaintiff was guilty of contempt of court'.[21]

The prevailing opinion then holds *as a matter of fact* that the petitioner sought to withhold his real reason, or reasons, for paying money to Mitchell, ostensibly for the bonds; that 'his answers to the questions as to why he had purchased them, and what protection he thought he was receiving through them, were vague and uncertain'; that 'the grand juror and his (two) associates (circuit judges) were fully justified in concluding that Oliver was inten-

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[19]

Pin-ball machines, where one who plays them stands to win or lose money, are by the Michigan Supreme Court held to be gambling devices within the meaning of § 302 of the Penal Code, Stat. Ann. § 28.534, Gibson v. Martin, 308 Mich. 178; Oatman v Port Huron Chief of Police, 310 Mich. 57.

[20]

The nature of such bonds is more particularly described in the testimony of Oliver, and in the opinions in Hartley, supra.

[21]

The return of the circuit judge 'must be taken as true', and, it was said, 318 Mich. 13, 'This court does not weigh the testimony but examines it to determine if there is evidence to support the finding'.

tionally evasive'; and that 'his evasive replies clearly tended to obstruct the investigation and were in consequence contemptuous in character'.[22]

Although four of the eight justices did not agree with the foregoing conclusions of fact, but expressed the opinion (28-32), 318 Mich. at 15-20, that the record did not contain testimony by plaintiff (petitioner) which was evasive or which showed he falsified,[23] members of the court below did not divide in construing the one-man grand jury law of this State, or in deciding constitutional questions arising therefrom.

6. The prevailing opinion (26), 318 Mich. 12-13, after noting the constitutional questions raised, decides them by reference to the prevailing opinion in the correlated or companion case *(In re Hartley,* 317 Mich. 441), stating that 'the claims made are without merit'.

In the case of *Hartley,* which arose before the same circuit judge acting as a one-man grand jury during the course of the same investigation, the witness urged that his

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[22]

'It is scarcely conceivable', continued the Chief Justice, 'that plaintiff did not know the real reason why he took these so-called bonds from Mitchell, and paid money to the latter', and he notes the circuit judges also concluded that Oliver's answers to questions relating to his disposition of the bonds were likewise false and evasive. The circuit judges had the advantage of hearing plaintiff's testimony and of noting his demeanor in giving it. The conclusion reached finds support in the record'.

[23]

Petitioner does not raise this question or issue of fact as such in his original brief; and his counsel contents himself, p. 10, by saying: 'That the testimony was not false upon its face is answered by the fact that four members of the Michigan Supreme Court have so held'. The evasive character of the testimony is ignored throughout petitioner's original brief.

sentence for contempt and subsequent detention were illegal on the same grounds as those urged by the petitioner at bar, contending: (1) due process of law under both the Federal and State Constitutions requires the filing of charges, a notice to the accused and a hearing in all contempt cases not committed in open court; (2) it is a denial of due process of law for a judge summarily to adjudge one guilty of contempt of court upon the basis of alleged false swearing, except where the court has personal knowledge of the falsity of the testimony; and (3) a one-man grand jury does not act as a court; therefore, it is not a direct contempt of court and is not punishable summarily.[24]

The court below held in *Hartley*, (1) that in conducting a one-man grand jury investigation under Michigan law, a circuit judge acts in a judicial capacity; (2) that it had previously upheld the power of a circuit judge, when so acting, to punish summarily for contempt; and (3) that Hartley's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence.[25]

The contra opinion in *Hartley* (27-29), 317 Mich. 451-454, turned on the question whether one could infer from the testimony 'that Hartley was giving evasive or false answers', which it answered in the negative.

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[24]

Cf. counsel's statement, original brief, p. 4, of the 'Questions Presented' in the case at bar, which are practically identical.

[25]

The decision on these three points rested on Michigan authority: Mundy v. McDonald, 216 Mich. 44; People v. Wolfson, 264 Mich. 409; In re Cohen, 295 Mich. 743; and In re Slattery, 310 Mich. 458; certiorari denied, 325 U. S. 876.

IV

Questions Presented

With the hope that the foregoing concise statement of the case may have clarified the premise of counsel's argument, we think that the 'Questions Presented' in petitioner's original brief, pp. 4, 8, 10, and 11, should be amended to read as follows:[26]

1. Is it a denial of due process to convict one of contempt of court summarily and without trial when the alleged misconduct ~~is not committed in open court~~ **is committed in the immediate presence of a Michigan circuit judge who, in a judicial capacity,[27] pursuant to the law of that State,[28] is acting as a one-man grand jury in the conduct of an investigation of suspected criminal offenses?**

2. Even assuming a witness has testified in open court **(here, before a circuit judge in chambers)**, is it a denial of due process to convict him of contempt of court summarily and without trial ~~for alleged false testimony, where the falsity of such testimony is not self-evident~~ **for giving evasive answers material to an investigation by a Michigan one-man grand jury of suspected criminal offenses, and thus obstructing justice?**

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[26] In amending the 'Questions Presented', as stated by petitioner's counsel, p. 4, words necessarily deleted are stricken out, while words added are printed in boldface type.

[27] In re Slattery, 310 Michigan. 458; certiorari denied, 325 U. S. 876.

[28] Michigan Code of Criminal procedure, chap. 7, § § 3-6, incl., Mich. Comp. Laws 1929 § § 17217-17220; Mich. Stat. Ann. § § 28.943-28.946.

3. Is it a denial of due process summarily to convict one of contempt of court ~~by reason of alleged perjury before a one-man grand juror~~ by reason of alleged evasive testimony before a Michigan circuit judge acting as a one-man grand jury?[29]

V

Summary of the Argument

First: It is not a denial of due process to convict one of contempt of court summarily when the alleged misconduct is committed in the immediate presence of a Michigan circuit judge who, in a judicial capacity and pursuant to a valid law of that State, is acting as a one-man grand jury in the conduct of an investigation of suspected criminal offenses:

1. The highest court of the State, in upholding the constitutionality of Michigan's one-man grand jury law (footnote 28), and in construing that statute, has repeatedly held that a judge conducting such a proceeding is acting in a judicial capacity.

Mundy v. McDonald, 216 Mich. 444, 20 A.L.R. 398;

People v. Doe, 226 Mich. 5;[30]

---

[29] This third question is a twin of Question 2.

[30] While in People v. Doe, supra, the decision of the trial court was upheld by an equally divided court, the question upon which there was a disagreement was not as to the constitutionality of the act or its construction in this respect. In re Slattery, supra.

People v. Wolfson, 264 Mich. 409;

In re Slattery, 310 Mich. 458, 466-467; certiorari denied, 325 U.S. 876.[31]

2. In apparent recognition of the general rule that Federal courts are bound by the construction placed upon the statute of a State by its highest court,[32] the Circuit Court of Appeals, Sixth District, accepted the foregoing decision and affirmed an order of the District Court denying Slattery relief in habeas corpus proceedings brought by him after he had exhausted his state remedies.

Slattery v. McDonald, Sheriff, 151 F.2d 326; certiorari denied, 326 U.S. 787; rehearing denied, 327 U.S. 814.

3. Counsel is therefore mistaken in the major premise of his argument on this point, and the authorities cited in his brief, pp. 8-10, are distinguishable.

Second: It is not a denial of due process to convict a witness of contempt of court summarily and without trial, for giving evasive answers in the immediate presence of a Michigan circuit judge acting as a one-man grand jury.

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[31] Citing inter alia the following cases wherein the court below affirmed convictions for contempt in one-man grand jury proceedings:

In re Wilkowski, 270 Mich. 678;
In re Watson, 293 Mich. 263;
In re Schnitzer, 295 Mich. 736.

[32] Chase Securities Corp. v. Donaldson, 325 U.S. 304, 312;
D. & M. Railway Co. v. Fletcher Paper Co., 248 U.S. 30.

1. Section 5 of chapter 7 of the Michigan Code of Criminal Procedure, *supra*, provides inter alia that 'any witness neglecting or refusing to answer any questions which such . . judge may require . . shall be deemed guilty of contempt'. And the Supreme Court of the State, upon consideration of the foregoing language, has held it to be an obstruction of justice punishable summarily as a direct contempt in *facie curiae*, for such a witness to refuse to tell what he knows, whether the refusal is absolute or by the substitute of evasive answers, *In re Slattery, supra*, and cases cited.

2. The Michigan doctrine exemplified in *Slattery, supra*, harmonizes closely with a rule recognized by this Court as applicable to a direct, *obstructive* contempt in *facie curiae*.

Ex Parte Hudgings, 249 U.S. 378, 11 A.L.R. 333;[33]

Clark v. United States, 289 U.S. 1;
In re Michael, 326 U.S. 224,[34]

the classic definition of which (so apt at bar) is found in the expressive language of Judge Learned Hand,

United States v. Appel, 211 F. 495, 496.

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[33]

In the Annotation which follows the Hudgings case, 11 A.L.R. at 342, on the subject 'Perjury or false swearing as contempt', it is said that 'cases dealing with evasive answers, which might be classed as the equivalent of a refusal to testify are beyond the scope of the note'.

[34]

When considering these cases the Court will of course bear in mind that it is reviewing an order of a State court unlimited in power by the Act of Congress referred to in Nye v. United States, 313 U.S. 33, 44-48, which in turn is cited in Michael, supra.

3. Federal courts in general recognize the rule that 'testimony which is obviously false or *evasive* is equivalent to a refusal to testify, and punishable as contempt, assuming that a refusal to testify would be', [35] especially in contempt cases growing out of the Bankruptcy Act of July 1, 1898.[36] E.g., from among many others,

In re Schulman, 177 F. 191;

In re Eskay, 38 F. Supp. 221; affirmed, 122 F. 2d 819.

Third: The third question is covered by the second; except it should be added, perhaps, that the question as presented by petitioner contains an erroneous premise. Petitioner was not convicted of contempt because he committed perjury, but because, in one respect, his testimony which was *prima facie* contradictory, obstructed the grand jury investigation.

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[35]

Quoted from note in 41 L.R.A. (N.S.) 478, reporting Creasy v. Hall, 243 No. 679; 148 S.W. 914.

[36]

Act of July 1, 1898, c. 541, § 41; 30 Stat. 556; June 22, 1938, c. 575, § 1; 52 Stat. 859; Title 11 U.S.C. § 69 a. See notes to decisions, 3 FCA, Title 11, s. 69, a (4), 362; and Book 1, FCA 10-Year Cum. Supp., at p. 134.

VI

The Argument

Point One

Petitioner was not denied due process of law when summarily convicted of contempt before a judge acting in chambers as a one-man grand jury.

Stating our position specifically, William Oliver was not denied due process when summarily convicted of contempt of court in the presence of a circuit judge in chambers who, under authority of a Michigan statute, Code of Criminal Procedure, chap. 7, §§ 3-6, as construed by the State's highest court, *In re Slattery*, 310 Mich. 458, was acting in his judicial capacity as a 'one-man grand jury' investigating suspected criminal offenses within his jurisdiction.

Petitioner's counsel thus poses the first question:

> "1. Is it a denial of due process to convict one of contempt of court summarily and without trial when the alleged misconduct is not committed in open court?" (petition, p. 4; argued, pp. 8-10).

The obvious though superficial answer securely wrapped in the question so stated, is that due process *would* be denied in such circumstances, for no informed person would assert that a constructive contempt committed entirely outside the precincts of a court may be punished summarily without notice or hearing.

The fault, however, lies in the premise; for while the alleged misconduct of William Oliver was not committed in a court room during the progress of a formal trial, the

offense did occur in the immediate presence of a judge who was then acting in a judicial capacity.

1. As noted in our summary of the argument, the Michigan Supreme Court, in construing the 'one-man grand jury law' (so often cited in this brief), is neither a prosecuting attorney, policeman or detective, but is acting in a judicial capacity, *In re Slattery, supra.*

In *Slattery,* counsel at bar who represented the petitioner there, assailed the constitutionality of the one-man grand jury statutes, claiming that they impose non-judicial duties on a judge, and 'that one cannot be held in contempt if he testifies before a non-judicial body'. Because of the importance of the question, the Michigan court 're-examined it with extreme care' and after reviewing many of its former decisions on the subject, said:

> "So that there may be no further question, we hold that the judge conducting a one-man grand jury proceeding is acting in a judicial capacity" (310 Mich. 466-467).

And the court also observes, 310 Mich. 478, there is 'no more important (judicial) duty than to sit as a one-man grand jury called to uncover criminal malfeasance in office'.

2. After this Court had denied him a writ of certiorari, 325 U.S. 876, Slattery applied for a writ of habeas corpus from the District Court of the United States for the Eastern District of Michigan, and from an order dismissing the writ after a due-course hearing, he appealed to the Circuit Court of Appeals, Sixth Circuit, which affirmed,

> *Slattery v. MacDonald,* 151 F. 2d 326; writ of certiorari denied, 326 U.S. 787; rehearing denied, 327 U.S. 814.

The Circuit Court said, among other things:

"The highest Court of the State held that the fact that the judge of the state circuit court was functioning as a one-man grand jury, pursuant to Michigan statutes, at the time the contempt was committed did not divest him of his judicial capacity; and it was pointed out that the Supreme Court of Michigan had in many other cases affirmed convictions for contempt in one-man grand jury proceedings similar to the instant case".

3. Counsel argues, p. 8, that 'in the instant case there was no refusal to appeal (appear) nor a refusal to answer questions' (citing § 5 of chapter 7 of the Code of Criminal Procedure, *supra*); therefore, it is urged, the circuit judge who acted as a one-man grand jury 'had to invoke his contempt powers as a circuit judge' as regulated in Michigan by The Judicature Act, Chap. 5, § 1 et seq., esp., §§ 1 and 2, Comp. Laws 1929, §§ 13910, 13911, Stat. Ann. §§ 27.511, 27.512.

The first section cited above, provides *in part:*

"Section 1. Every court of record shall have power to punish by fine or imprisonment or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, *and no others:* [37]

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

---

[37]

The italics are supplied by petitioner's counsel in his Appendix A, p. 13, which suggests a question not necessary to decision: whether the legislature of Michigan may so strangle the inherent power of a constitutional state court.

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;'' (Comp. Laws 1929, § 13910, Stat. Ann. § 28.511).

The foregoing quotation is as far as counsel goes in his original brief, pp. 8, 9, and 13, and not realizing its importance he quite inadvertently omits the 7th subdivision of § 1, *supra*, which reads:

"7. All persons summoned as witnesses for refusal or neglect to obey such summons, or to attend or to be sworn, or when so sworn to answer any legal and proper interrogatory''.[38]

The second section cited above, provides:

"Sec. 2. When any misconduct, punishable by fine and imprisonment as declared in the last section, shall be committed in the immediate view and presence of the court, it may be punished summarily, by fine or imprisonment, or both, as hereinafter prescribed'' Comp. Laws 1929, § 13911, Stat. Ann § 28.512).

Section 3 of chapter 5 of the Judicature Act, *supra*, Comp. Laws 1929, § 13912, Stat. Ann. § 28.513, then provides the procedure for punishing contempts 'not in the presence of the court'.

Counsel urges that § 3, *supra*, applies to this case, since the contempt was not committed in the presence of the court, but in so construing these sections of the Judicature Act

[38]

Please compare this language with that of § 5 of chapter 7 of the Michigan Code of Criminal Procedure, Comp. Laws 1929, § 17219, Stat. Ann. § 28.945, under which the petitioner in the pending cause was convicted summarily.

of Michigan, he forgets that the Supreme Court of that State disagreed with him. In *Hartley*, 317 Mich. 444-445, which in respect to statutory construction and application controlled *Oliver*, 318 Mich. 13, the court held that the circuit judge, 'while acting as a one-man grand jury, may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith', and that Hartley's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided by section 3 of chapter 5 of the Michigan Judicature Act, *supra*. It was, the court held, properly dealt with summarily under the authority of §§ 1 and 2 of that chapter (citing 3 Comp. Laws 1929, §§ 13910, 13911 [Stat. Ann. §§ 27.511, 27.512]).

The court in so holding, be it again noted, did not disagree on these questions of statutory application or construction, but divided only on the issue whether the petitioners *Hartley* and *Oliver* were '*in fact*, guilty of contempt', 317 Mich. 445, a question not raised in petitioner's original brief.

4. The cases cited by counsel, pp. 9, 10,

Re Savin, 131 U.S. 267;
Cooke v. United States, 267 U.S. 517;
In re Michael, 326 U.S. 224,

are distinguishable because in each instance this Court was construing Federal statutes which were enacted by the Congress for the express purpose of curtailing the powers of the courts of the United States to punish for contempt, *Nye v. United States*, 313 U.S. 33, 44-48, *In re Michael supra*, at 227.

In the Michigan enactments construed by the Michigan court the words 'in open court' do not occur. Subdivision 1 of § 1 of chap. 5 of the Judicature Act, *supra*, does contain the phrase 'during its sitting', but this refers to disorderly acts committed doubtless 'in open court'.

On the other hand, subdivision 7 of § 1 *supra*, which authorizes punishment for witnesses, does not limit its provisions to witnesses who attend in open court.

And § 2 thereof, *supra*, refers to 'the immediate view and presence of the court'. As this Court observed long ago, in *Savin, Petitioner, supra*, at 277,

> "It was held in *Heard v. Pierce*, 8 Cush. 338, 341, that 'the grand jury, like the petit jury, is an appendage of the court, acting under the authority of the court, and the witnesses summoned before them are amenable to the court, precisely as the witnesses testifying before the petit jury are amenable to the court'. Bacon, in his essay on Judicature (No. LVI), says: 'The place of justice is an hallowed place; and therefore not only the bench, but the footpace and precincts and purprise thereof ought to be preserved against scandal and corruption'. We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form', *Ex Parte Terry*, 128 U.S. 389, 309" . . .

This principle, we respectfully submit, applies with equal force to a circuit judge of Michigan sitting in chambers, acting in a judicial capacity, examining witnesses to elicit the truth relating to suspected criminal offenses, and acting as a one-man grand jury by virtue of the authority of Michigan law. We respectfully submit, therefore, that petitioner was not denied due process of law when summarily convicted of contempt.

Point Two

It is not a denial of due process to convict a witness of contempt of court summarily and without trial, for giving evasive answers to pertinent questions in the immediate presence of a Michigan circuit judge acting as a one-man grand jury.

Again we find an erroneous premise in the question as propounded by counsel, p. 4, as argued p. 10:

> "2. Even assuming a witness has testified in open court, is it a denial of due process to convict him of contempt summarily and without trial for alleged false testimony, where the falsity of such testimony is not self-evident?"

Certainly, it is a denial of due process so to do; but where the falsity is self-evident, or where the testimony is evasive, that is quite another matter. And counsel frankly recognizes the first exception, and he is quite correct in saying: 'But where evidence is required to establish the falsity of testimony then due process requires a notice and a hearing on the question of the falsity of the testimony' (citing numerous authorities).

1. The Michigan Supreme Court in *Slattery, supra,* finding that the grand jury witness had given false or evasive answers to questions, evading answers by subterfuge, relied strongly on the rule so clearly stated by Judge Learned Hand nearly 35 years ago in an opinion which time after time has received the approval and recognition of this Court,

United Stgtes v. Appel (June 1913), sometimes cited *In re Appel,* 211 F. 495.

Judge Hand said:

"The rule, I think, ought to be this: If a witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. . . . If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry".

And in such reliance, the Michigan court had this to say in part, 310 Mich. 476:

"The refusal to answer or the giving of an evasive reply obstructs the work of a judge or jury which, in an orderly manner, is seeking to ascertain whether a complaint is true and certain crimes have been committed. If the witness could hide behind the answer 'don't remember' or words to that effect, when such statement was manifestly untrue, it would emasculate

the one-man grand-jury proceedings and make them of little or no value".

See, also, *O'Connell v. United States*, 40 F. 2d 201, and the cases therein cited,[39] holding that notwithstanding a witness makes formal answer, withholding truth may constitute obstruction of justice punishable as contempt, although also constituting perjury.

3. The principles enunciated by Judge Learned Hand in *Appel, supra,* have been recognized by the Court in several cases cited by petitioner's counsel,

Ex Parte Hudgings, 249 U.S. 378, 11 A.L.R. 333;
Clark v. United States, 289 U.S.1;

and

In re Michael, 326 U.S. 224,

as an exception to the general rule that perjury or false testimony of itself does not constitute contempt.

In the case of *Hudgings, supra,* upon which petitioner so strongly relies to sustain his position, it was held that perjury *in facie curiae* is not of itself punishable as contempt of a *federal* court apart from its obstructive tendency, p. 383; hence, a *District Court* has no power to adjudge a witness guilty of contempt solely because in the court's opinion he is wilfully refusing to testify truthfully, and to confine him until he shall purge himself by giving testimony which the court deems truthful, p. 384. But the Court, p. 382, recognized that 'because perjury is a crime

[39]

Loubriel v. United States, 9 F. 2d 807; In re Schulman, 177 F. 191; In re Kaplan Bros., 213 F. 753, and others, cited in 40 F. 2d at 204-205.

defined by law . . . does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt', citing as an example, among others, *United States v. Appel, supra.*

In the *Clark case,* 289 U.S. 11-12, the exception is again pointed out:

> "The books propound the question whether perjury is contempt, and answer it with nice distinctions. Perjury by a witness has been thought to be not enough where the obstruction to judicial power is only that inherent in the wrong of testifying falsely. *Ex Parte Hudgings, supra.* For offenses of that order the remedy by indictment is appropriate and adequate. On the other hand, obstruction to judicial power will not lose the quality of contempt though one of its aggravations be the commission of perjury. Cf. . . . . *(inter alia) United States v. Appel,* 211 Fed. 495".

And while the Court *In re Michael,* 326 U.S. 324, held that a witness may not be punished for contempt under § 268 of the Judicial Code for perjury alone, Mr. Justice Black said, pp. 228-229:

> "Here there was, at best, no element except perjury 'clearly shown'. Nor need we consider cases like *United States v. Appel,* 211 F. 495, 496, pressed upon us by the government. For there the Court thought that the testimony of Appel was 'on its mere face, and without inquiry collaterally, . . . not a bona fide effort to answer the questions at all'. In the instant case there was collateral inquiry; the testimony of other witnesses was invoked to convince the trial judge that petitioner was a perjurer. . . This was the equivalent

of saying that for perjury alone a witness may be punished for contempt. Sec. 268 is not an attempt to grant such power".

We also invite attention to the bankruptcy court contempt cases cited in this division of our summary of the argument, as affording an analogy.

4. It is important in this connection to note, as did Mr. Justice Black for the Court in *Michael*, 326 U.S. 227, that § 268 of the Judicial Code, when considered in the light of the Act of 1831, 4 Stat. 487, limits the power to punish contempts to misbehavior which obstructs the administration of justice. 'The exercise by federal courts', Mr. Justice Black continues, 'of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury'.

No such congressional limitation restrains exertion of *state* judicial power to punish for contempt; hence, in the instant case this Court has no occasion to apply the terms prescribed by § 268 of the Judicial Code; and, in the absence of violation of the due process clause of the Fourteenth Amendment, the inherent authority of a state court in contempt proceedings is curbed only by the Constitution of the State, or by acts of the state legislature.[40]

But even though the yardstick supplied by § 268 of the Judicial Code could be used to measure the power of a

---

[40]

It is interesting, if not important, to note the few occasions on which this Court has been called upon to review a state adjudication of contempt of court. See: Vol. 2, United States Supreme Court Digest, Constitutional Law, § 273, Contempt.

Michigan circuit judge, no usurpation of judicial power (and the question in this case is strictly one of power) would be revealed if the answers of a one-man grand-jury witness were evasive, and if such witness were shown to have intentionally evaded replies to material questions propounded, thereby in effect refusing to answer, for clearly in such circumstances his course of conduct would amount to an obstruction of justice.

We, therefore, respectfully submit it was not a denial of due process to convict this witness (Oliver) of contempt of court summarily and without trial, for giving evasive answers.

The third question presented by petitioner's counsel, p. 4, whether it is a denial of due process summarily to convict one of contempt by reason of alleged perjury before a one-man grand jury, or, as we have rephrased it, by reason of evasive answers, has been answered in considering the second; and it requires no further discussion.

VII

Conclusion

We, therefore, respectfully submit that the judgment of the court below should be affirmed.

Respectfully Submitted,

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APPENDIX 'A'

Summary of Michigan's criminal procedure under her 'one-man grand jury system', its history and purposes.

For a clear understanding of the true function of Michigan's one-man grand jury it is essential to consider: (1st) her early relinquishment, State Const. 1850, article 6, § 28, of a constitutional guaranty, State Const. 1835, article 1, § 11, that 'no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury'; *(2nd)* the special proceedings drawn in question here, authorized by law for extraordinary occasions,[1] in which a judge of a court of record constitutes himself a one-man grand jury to investigate suspected criminal offenses by examining material witnesses;[2] and *(3rd)* some of the purposes for which this law has been invoked by the State.

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[1]

We lay aside any consideration of Michigan criminal procedure in due course for magisterial investigation of specific complaints charging offenses not cognizable by a justice of the peace, for the arrest of offenders, for the conduct of a preliminary examination, and for the filing of an information. Mich. Code of Criminal procedure, chapters 6 and 7, Comp. Laws 1929 § 17193 et seq. and § 17254 et seq., Stat. Ann. § 28.919 et seq. and § 28.980 et seq.

[2]

Idem., chap. 7 § § 3-6, Mich. Comp. Laws § § 17217-17220, Mich. Stat. Ann. § § 28.943-28.946.

1

Abolishment of traditional grand jury.

Article 1, § 11, of Michigan's first Constitution (1835), following somewhat the pattern of the 5th Amendment to the Federal Constitution, guaranteed that no person should be held for a criminal offense 'unless on the presentment or indictment of a grand jury', except in specified instances; but the Constitution of 1850, article 6, § 28, and Michigan's present Constitution (1908), article 2, § 19, omitted that requirement, and substituted therefor the 'right to be informed of the nature of the accusation'.[3]

> "In 1859 the regular calling of grand juries was dispensed with and provisions were made for prosecuting offenders by means of informations filed by the prosecuting attorney, although the grand jury was preserved as an institution of the court, to be invoked by the circuit judge if conditions should warrant".[4]
>
> Gillespie's Criminal Law and Procedure, Vol 1, § 99, pp. 101-102.

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[3] This section of Michigan's bill of rights also guarantees inter alia 'a speedy and public trial', the right 'to be confronted by the witnesses', 'to have compulsory process', and to 'have the assistance of counsel'.

[4] The author of this statement observes by way of foot note that the Michigan legislature in 1931 (Act No. 284) provided for a permanent grand jury in every county of 70,000 population and upward, to meet twice in each year; and that in a little over one year, it appeared that the plan was not a success, and the statute was repealed (Act No. 31 Pub. Acts Mich. 1933).

The present law of Michigan [5] prohibits the drawing of grand juries unless the judge shall so direct.[6]

2

The Michigan 'One-man Grand Jury'.

The Michigan Code of Criminal Procedure, chap. 7, § § 3-6, incl.,[7] reenacts Act. No. 196, Pub. Acts 1917, as amended, the history of which is as follows:[8]

> "After 1859 the 23-man Grand Jury Statute was not repealed, but became an extraordinary instrument called into use only occasionally, and then for the purpose of investigating widespread corruption, usually of an official character.

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[5]

Section 7 of chapter 7 of the Michigan Code of Criminal Procedure provides that 'grand juries shall not hereafter be drawn, summoned to attend at the sittings of any court within this state,. . . . unless the judge thereof shall so direct by writing under his hand, and filed with the clerk of said court' (Mich. Comp. Laws 1929 § 17221 [Mich. Stat. Ann. § 28.947]).

[6]

This discretion is seldom exercised, for in Michigan the 'one-man grand jury' has in recent years taken the place once occupied by the traditional 16-member grand jury. People v. McCrea, 303 Mich. 213 (cert. denied, 318 U.S. 783); People v Roxborough, 307 Mich. 575 (cert. denied, 323 U.S. 749; and In re Slattery, 310 Mich. 458 (cert. denied, 325 U.S. 876).

[7]

Mich. Comp. Laws 1929 § § 17217-17220, Mich. Stat. Ann. § § 28.943-28.946.

[8]

The quotation is from the majority report of a special committee of the Michigan State Bar. September 1947 issue of Michigan State Bar Journal, pp. 55-62, at p. 58.

In 1885 a Michigan statute establishing the Detroit police court gave inquisitorial powers to police magistrates of a similar character to the one-man grand jury. In 1915 a Committee on Law Reform of the Michigan State Bar Association recommended the appointment of a Special Committee on Criminal Law and procedure. This Special Committee . . . concentrated its efforts on certain specific improvements in criminal procedure, and recommended a bill for the institution of proceedings for the discovery of crime, which was published as a part of the proceedings of the Michigan State Bar Association Journal in 1916.[8a]

In 1917 this bill was passed by the Michigan Legislature and became the present One-Man Grand Jury Law. It authorizes a single judge to act as a Grand Juror in place of the 23-Man Grand Jury".

The key that unlocks such power is supplied by section 3 of chapter 7, id. (Comp. Laws 1929 § 17217; Stat. Ann. § 28.943) which provides:

"Sec 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon application of the prosecuting attorney, or city attorney

[8a]

Proceedings of the 26th annual meeting of the Michigan State Bar Association, 1916 pp. 101-115, at 103-105.

. . . . , shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witnesses and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings''.

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, 'he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter of proceeding in like manner as upon formal complaint'.[9]

So far as secrecy is concerned, those participating in the inquiry 'shall be governed by the provisions of law relative to grand juries' (id., § 4 [Comp. Laws 1929, § 17218; Stat. Ann. § 28.944]).[10]

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[9] Also, if so satisfied, the justice or judge shall report the matter to the proper officials to the end that any public officer so accused may be removed from office. These are all considered to be 'judicial acts'. In re Slattery, 310 Mich. 458; cert. denied, 325 U.S. 876.

[10] Hence, it has been held, In re Slattery, supra, that because of the secrecy of one-man grand jury proceedings, as provided in § 4, chap. 7, a transcript of such proceedings is not included in its entirety in the return to writs of habeas corpus or certiorari issued on petition by a witness who has been jailed for contempt in failing to give proper answers to question put to him in one-man grand jury proceedings.

Witnesses who neglect or refuse to appear upon summons of the one-man grand jury 'or to answer questions . . . . material to such inquiry' may be punished for contempt,[11] though the sentence imposed may in judicial discretion be commuted or suspended if the witness appears and answers such questions (id., § 5 [Comp. Laws 1929, § 17219; Stat. Ann. § 28.945]).

And under the provisions of § 6 of chapter 7 of the code (Comp. Laws 1929, § 17220 [Stat. Ann. § 28.946]), a witness who answers questions which might tend to incriminate him, is granted full immunity from prosecution for any offense concerning which he testifies.[12]

3

Purposes for which Michigan one-man grand jury is employed.

It is at least worthy of note that the one-man grand jury law has been called into play in Michigan only when con-

[11]

Such a proceeding in contempt is deemed criminal in nature. In re Wilkowski, 270 Mich. 787. See: In re Ward, 295 Mich. 742; In re Cohen, 295 Mich. 748; and In re Slattery, supra.

[12]

This section of the code is in recognition of the state constitutional mandate that 'no person shall be compelled in any criminal case to be a witness against himself' (Mich. Const. 1908, article 2, § 16). It, of course, does no violence to the 5th or 14th Amendments to the Federal Constitution. Adamson v. California, Oct. Term 1946, No. 102, June 23, 1947, 67 Sup. Ct. 1672. Cf. In re Watson, 293 Mich. 263. And see In re Schnitzer, 295 Mich. 736; People ex rel. Roach v. Carter, 297 Mich. 577; People v. Reading, 307 Mich. 616; People v. Woodson, 309 Mich. 391; People v. Norwood, 312 Mich. 266, in which the court repeatedly refers to such proceedings as those of a 'one-man grend jury'.

sidered necessary to the public interest, or where it was deemed important to investigate wide-spread corruption in high places. A few examples will suffice:

Thus, in a comparatively early case, a one-man grand jury investigated a rather vicious combination in restraint of trade intrastate,

People v. Butler, 221 Mich. 626.

The law in question was later used to investigate, charge, and convict[13] a former mayor of the city of Hamtramck, high-ranking police officers of that municipality, and the proprietors of houses of prostitution, of a common-law conspiracy [14] to obstruct justice by wilfully and corruptly permitting and allowing them to operate,

People v. Tenerowicz, 266 Mich. 276.

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[13]

To say that this state law is used to 'convict', simply means that testimony of witnesses who appeared before the one-man grand jury, and, under compulsion of the fear of punishment for contempt, admitted their own guilt and implicated others, is adduced through the same witness at the trial unless he becomes wholly recalcitrant. See Hemans v. United States, No. 299 October 1947 term of this court. The law is thus made an effective instrument for evoking the truth. For, by way of analogy, 'a state may control such situation in accordance with its own ideas of the most efficient administration of criminal justice. The purpose of due process is not to protect an accused against a proper conviction'. Adamson v. California, supra.

[14]

Common- law conspiracies are punishable under § 505 of the Michigan Penal Code (Stat. Ann. § 28.773) which makes it a felony to commit any indictable offense at the common law, 'for the punishment of which no provision is expressly made by any statute' of the State.

It was employed to investigate, charge, and convict the members of a legislative committee and others who attempted to conduct a recount of votes cast for candidates for state office, of a common-law conspiracy to violate provisions of the State's general election law,

In re Investigation of Recount, 270 Mich. 328;

People v. O'Hara, 278 Mich. 281.

Such a one-man grand jury investigated corrupt practices in Wayne county and charged the prosecuting attorney and his chief investigator, the sheriff and his deputy, together with the operators of houses of ill fame and other illegal enterprises, with a common-law conspiracy to obstruct justice by engaging in a 'protection money' scheme, and the defendants were later convicted,

People v. McCrea, 303 Mich. 213; cert. denied (October Term 1942, No. 651), 318 U.S. 783;

People v. Wilcox, 303 Mich. 287; and cases in sequence.

The same basic conspiracy was involved in a later group of cases where a one-man grand jury indicted and the State prosecuted and convicted the proprietors of gambling enterprises (numbers and mutuel), a former mayor of the city of Detroit and other law-enforcing agents, of a common-law conspiracy to obstruct justice by means of systematic bribery,

People v. Roxborough, 307 Mich. 575; cert. denied, 323 U.S. 749; and see cases in sequence, including

People v. Ryan, 307 Mich. 610, and *People v. Reading*, 307 Mich. 616.

The same one-man grand jury, investigating corruption in the county of Wayne, charged, and the people convicted police officers of the city of Detroit, the secretary of the mayor of that municipality (People v. Reading, *supra*), and the proprietors of 'hand books', of a common-law conspiracy to obstruct justice by means of 'protection money' or bribery.[15]

People v. Heidt, 312 Mich. 629;

People v. Bartlett, Reading et al., 312 Mich. 648, and cases following in sequence.

Such a grand jury investigation resulted also in the indictment of the mayor of Hamtramck for a conspiracy with other named defendants wilfully and corruptly to assist and enable the maintenance and operation of houses of ill fame and gambling establishments in that city, and thus to obstruct justice. Conviction was reversed for error in the charge of the trial judge,

People v. Kanar, 314 Mich. 242.

And, finally, a one-man grand jury in the county of Ingham (Lansing, the capital) indicted, and a petit jury convicted a member of the state senate and another of a

[15]

We trust it is permissible to say, in the light of the conspiracy cases cited in this appendix, that were it not for Michigan's one-man grand jury system (however it may be criticized by its opponents), conviction of public officials who have been derelict in their trust, would be impossible.

criminal conspiracy to corrupt the legislature of the State of Michigan,[16]

People v. Delano et al., 318 Mich. 557.

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[16] In that case a motion for rehearing is pending, and we are informed by counsel for Delano that an application for certiorari from this Court is contemplated. Numerous other cases growing out of the Ingham county (Lansing) one-man grand jury are now pending on appeal in the Michigan Supreme Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 215

In re WILLIAM OLIVER

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF FOR DETROIT CHAPTER, NATIONAL LAWYERS GUILD, AMICUS CURIAE

DETROIT CHAPTER,
NATIONAL LAWYERS GUILD,
HENRY S. SWEENY,
President.

PATRICK H. O'BRIEN,
Chairman, Civil Liberties Committee.

ERWIN B. ELLMANN,
On the Brief.

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In re WILLIAM OLIVER

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF FOR DETROIT CHAPTER, NATIONAL LAWYERS GUILD, AMICUS CURIAE

With the consent of the parties, the following brief is submitted by the Detroit Chapter of the National Lawyers Guild, as *amicus curiae*. This organization of Michigan lawyers is vitally interested in the protection of civil rights in investigations under the so-called "one-man grand jury" statute, which is involved in the case at bar.

OPINION BELOW

The circuit judge for the County of Oakland who sentenced petitioner for contempt gave his reasons orally and later amplified them in his return (R. 8).* The opinions of the Supreme Court of Michigan, upon petitions for writs of habeas corpus and certiorari, affirming the conviction by an equally divided court, are reported in 318 Mich. 7 (1947).

JURISDICTION

The judgment of the Supreme Court of Michigan dismissing the writ of habeas corpus was entered May 16, 1947. Petition for writ of certiorari was granted by this Court on October 13, 1947. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended, U. S. C., Title 28, Sec. 344(b).

QUESTION PRESENTED

Whether, consistent with the due process clause of the Fourteenth Amendment, a county judge, sitting in secret session pursuant to the Michigan "one-man grand jury" statute, may summarily convict and sentence a witness for contempt for giving "false and evasive" testimony although the alleged misconduct is neither self-evident, committed "in the presence of the court," nor supported by evidence.

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*This and subsequent references are to the record filed in the court below and refiled in this Court.

STATUTE INVOLVED

The provisions of the Michigan "one-man grand jury" statute, C. L. 1929, § 17217-17220, Mich. Stats. Ann. §§28.942-28.945, are set forth in Appendix A, *infra*, p. 34.

STATEMENT

Proceedings before "one-man grand juror."—Petitioner William Oliver, an owner and operator of pin ball machines in Oakland County, Michigan, was summoned to appear September 11, 1946 before Honorable George B. Hartrick, one of three circuit judges for Oakland County. At such time Judge Hartrick, pursuant to C. L. 1929, § 17217, *et seq.*, Mich. Stats. Ann., § 28.942, *et seq.*, was conducting a so-called "one-man grand jury" investigation "concerning violations * * * such as gambling, operation of gambling devices, bribery of public officers and other crimes enumerated in a petition" previously filed (R. 8). In obedience to a subpoena (R. 9), petitioner appeared before Judge Hartrick and the two other circuit judges of Oakland County who were described as sitting with him "in an advisory capacity."[1] Petitioner, who had been interrogated in the same investigation six months earlier (R. 17), was then questioned at considerable length in a secret session of the "grand jury."

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[1] C. L. 1929, §13666, Mich. Stats. Ann., §27.188, to which Judge Hartrick refers in his answer (R. 8), provides that in counties where there are two judges, they may both sit together "in the hearing of trials, or causes, or on all questions coming before them * * *" The statute does not in terms prescribe a procedure for counties, such as Oakland, where there are three circuit judges.

According to the selectively condensed testimony of petitioner which is set forth in the "answer" of the "grand juror" to the writ of habeas corpus (R. 10-14), petitioner was the owner and operator of pin ball machines in Oakland County (R. 10); the machines were "perfectly legal" but could be used for gambling purposes (R. 12). In September 1944 one C. E. Mitchell, doing business under the name of Midwest Bonding Company (R. 9), approached petitioner and induced him to buy certain "bonds" which purported to guarantee reimbursement to the county for "extra" expenses (R. 13) of prosecuting persons using the pin ball machines for gambling purposes (R. 12). Petitioner admitted that he had discussed the project with other operations of pin ball machines (R. 13), that he did not know who was to be prevented from misusing the machines (R. 12), and that he "didn't think anything special" about a stranger making "a contract for the county" (R. 13). He admitted he did not discuss the "bonds" with an attorney, but stated that he bought them because he thought this would demonstrate his good faith and desire to operate his machines in a legitimate manner (R. 14). Petitioner did not have the "bonds" in his possession; he stated he was unable definitely to tell the exact date on which he destroyed the bonds (R. 10) although he destroyed them at the end of the year in which they had expired (R. 11). He acknowledged that he had never previously had such bonds in his possession and that the destruction of such bonds was "an event" which had never previously befallen him in his lifetime (R. 11). Despite repeated questions on the subject, he was unable to state how he destroyed the bonds but indicated that he "probably threw them in the trash can" since that was his usual method of disposing of unwanted papers (R. 11).

The portions of the petitioner's testimony included in the record do not indicate that he refused to answer any

question; he did not assert persistent forgetfulness of events within his obvious knowledge: he does not appear to have been insolent in his manner or contumacious in his replies. At the conclusion of his interrogation, however, petitioner was told by the "grand juror" (R. 14):

> "Because the story doesn't, if you want it put in language you understand, doesn't jell and we believe that, I think we all believe, that I believe that, and Judge Holland here, is my associate, although I am technically the Grand Juror, we more or less like to have in cases of this kind, at least the advice of other reasonable persons to see whether or not we are jumping at wild conclusions. I don't think any one person who reads your testimony, could believe this story. I don't believe my associates do * * *"

After which Judge Hartrick asked each of his associates, Judge Holland and Judge Doty, if they could believe petitioner's story; each replied with a laconic "no" (R. 14).

Due to the sudden illness of the "grand juror" (R. 10), there was insufficient time to prepare an order adjudging petitioner guilty of contempt until September 14, 1946 (R. 10), three days after petitioner was taken into custody (R. 2-3). In this "judgment and sentence" (R. 15, 16), the grand juror indicated that petitioner was interrogated by him while under oath; that he answered the questions "evasively," and that he "repeatedly gave contradictory answers to the same questions concerning matters material to the inquiry * * *" (R. 16).

Proceedings below.—On September 14, 1946, a petition for a writ of habeas corpus and ancillary writ of certiorari was filed in the court below in behalf of petitioner by his attorney (R. 2) who alleged that he had been denied opportunity to confer with petitioner who was in custody although no order of commitment had yet been entered (R. 6). The writs were issued the same day (R. 5).

In his answer, the grand juror asserted (R. 9) that petitioner

> "gave false and evasive answers concerning the status of the whereabouts of the said bonds as follows:
>
> (a) That the said William D. Oliver testified that he had destroyed the said bonds.
>
> (b) That the said William D. Oliver gave false and evasive answers as to the method employed by him in destroying said bonds.
>
> (c) That the said William D. Oliver impeded the progress of the Grand Jury by refusing to give information which would enable the Grand Jury to discover said bonds."

Thereafter, petitioner moved the court below (R. 17) to enter an order requiring production of the entire testimony of petitioner before the "grand jury," contending that such testimony would reveal that he had identified a copy of the "bond" which he had purchased from Mitchell and that he "had no purpose in failing to produce" the "bond" if it were in existence "or in falsifying as to the circumstances of its disposal." This motion was supported by petitioner's affidavit which was never refuted, although in the answer of the "grand juror" it was claimed that revelation of any more of petitioner's testimony would "seriously retard" the activities of the investigation (R. 18). The Supreme Court of Michigan denied the motion (R. 19).

After hearing on the petition and the return of Judge Hartrick, the writ was dismissed by an equally divided court. Four justices concluded that petitioner was properly punished for contempt, rejecting the contention that he was not accorded the protection assured by the "due process" provisions of the Federal and State Constitutions, for reasons set out in a related case, *In re Hartley*,

317 Mich. 441 (1947). It was also emphasized in the prevailing opinion that the court below "does not weigh the testimony but examines it to determine if there is evidence to support the finding," *In re Oliver*, 318 Mich. 7, 13 (1947), which test was here found to have been fulfilled.

On the other hand, four justices concluded that careful review of such testimony of petitioner as was included in the record "fails to disclose a single evasive answer, especially when read in connection with the whole of the quoted testimony." Recognizing that petitioner's testimony may not have been "what the examining grand juror had expected the witness would give," it was emphasized that this was scant justification for punishment for contempt, particularly when the return of the grand juror failed to indicate or identify a single statement of petitioner which was either false or evasive.

SUMMARY OF ARGUMENT

Proceedings before a "one-man grand jury" in Michigan differ radically from ordinary judicial inquiries and call for greater rather than less restraint upon the arbitrary exercise of the contempt power. Without benefit of representation by counsel, petitioner was required to testify at a secret session of the "one-man grand jury" and when his answers did not satisfy his questioners, he was jailed for contempt without notice or hearing although the record discloses no refusal to answer questions, no statement which was false, and no obstruction of the investigation. In such circumstances, petitioner's summary conviction and sentence for contempt by a "one-man grand juror" offended minimum standards of procedural fairness which Michigan is required to observe by virtue of the due process clause of the Fourteenth Amendment.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS A COUNTY JUDGE, SITTING IN SECRET SESSION PURSUANT TO THE MICHIGAN "ONE-MAN GRAND JURY" STATUTE, FROM SUMMARILY COMMITTING A WITNESS FOR CONTEMPT WHEN THE ALLEGED MISCONDUCT HAS NOT BEEN "IN THE PRESENCE OF THE COURT" AND IS NEITHER SELF-EVIDENT NOR SUPPORTED BY EVIDENCE IN THE RECORD.

A. Origin and Development of the "One-Man Grand Jury" in Michigan.

The case at bar appears to present the first occasion in which this Court has undertaken to review a controversy arising out of proceedings pursuant to the so-called "one-man grand jury" statute of the State of Michigan, C. L. 1929, § 17217, *et seq.*, Mich. Stats. Ann., § 28.942, *et seq.* Although this legislation is not unparalleled, it is in Michigan that the "one-man grand jury" has been most frequently and sensationally employed as an important instrument in the administration of criminal justice. The contempt power, as the instant case confirms, is much more than a casual incident of "one-man grand jury" investigations to be availed of in infrequent and abnormal situations to safeguard the integrity and dignity of the proceedings; rather, the power to punish for contempt has been an essential element of this singular investigative process, an ingredient indispensable to its effectiveness as well as a fertile source of abuse. Before considering constitutional limitations upon summary and arbitrary assertion of the contempt power in such proceedings, it, accordingly, seems appropriate to review the nature and development of the "one-man grand jury" system itself.

In 1916 a special committee on criminal law and procedure of the Michigan State Bar Association submitted a report to that organization which deplored the lack of effective statutory instrumentalities for the discovery of crime in a state where the common law grand jury had fallen into disuse.[2] To meet what was considered to be a vital procedural need, the committee submitted a draft of a proposed act authorizing judicial investigations of crime. This was presented to the Michigan Legislature under the sponsorship of the State Bar Association and, with slight modifications, it became in the following year the basic one-man grand jury statute.[3]

It was observed in the committee's report that the proposed act was patterned in large measure after an earlier Michigan statute which granted investigative powers to Detroit police judges, P. A. 1885, Act 161, Sec. 20. The analogy between such investigative functions and those of coroners seems to have been tacitly assumed:

> "In his History of the Criminal Law of England, Sir James Fitz James Stephen says: 'It is singular that with the law as to coroners in full operation since 1276, no duties of the same sort should have been imposed on the justices of the peace appointed forty-eight years afterwards in 1324.' It is no less singular that in our present Michigan statutes under the head of 'Proceedings for the Discovery of Crime' the sole provisions relate to Coroners' Inquests.'"[4]

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[2] The report is contained in Proceedings of the Twenty-Sixth Annual Meeting, The Michigan State Bar Association, 101-105 (1916). See also Winters, "The Michigan One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 138-139 (1945).

[3] The statute remained unchanged until 1947 when it was amended to prohibit the same judge from serving as grand juror and as examining magistrate at the preliminary examination of one whom he had indicted. House Enrolled Act, No. 31, 64th Legislature, Reg. Sess., 1947.

[4] Proceedings of the Twenty-Sixth Annual Meeting, The Michigan State Bar Association, 101-103 (1916). That portion of Stephen's work referred to is reprinted in 2 Select Essays in Anglo-American Legal History 443, 455 (1908).

Although the court below has observed that the "one-man grand jury" proceeding is in the nature of an inquest, *In re Investigation of Recount,* 270 Mich. 328, 335 (1935), it has also been suggested that the judge acts as a "conservator of the peace" whose powers are specifically recognized in Article VII, § 17 of the Michigan Constitution of 1908. See *Oakman v. Recorder of Detroit,* 207 Mich. 15, 23 (1919); *In re Slattery,* 310 Mich. 458, 465-467 (1945), *cert. den.* 325 U. S. 876. Perhaps closer historical affinity may be found to the practice under the Assize of Clarendon where royal justices were sent throughout the realm of Henry II to inquire into the commission of robberies and other misdeeds of violence,[5] and to the special inquisitions which, under Edward I, gave place to general inquisitions into offenses against the forest laws.[6]

Indeed, the techniques regularly employed in "one-man grand jury" investigations have more than superficial resemblance to those of the French *juges d'instruction* under the inquisitorial system of the Continent. *Garner, "Criminal Procedure in France,"* 25 Yale L. J. 255 (1916); *Willoughby, Principles of Judicial Administration,* 195-208 (1929). See also *State v. Smith,* 56 S. D. 238, (1929); *State ex rel. Poach v. Sly,* 63 S. D. 162 (1934). Comparisons have also been drawn between the Michigan "one-man grand jury" statutes and much earlier legislation in a few other states.[7] Whatever common trends may be dis-

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[5] See Maitland, Constitutional History 109-110 (1910), quoted in Willoughby, Principles of Judicial Administration 175 (1929).

[6] See 1 Holdsworth's History of English Law 98 (3rd ed., 1922).

[7] Comparable legislation is discussed in Winters, "The Michigan One-Man Grand Jury," 28 J. Am. Jud. Soc., 137, 139-140 (1945) which is perhaps the most informative article on the Michigan system. See also "A Genuinely Efficient Grand Jury Inquest," 26 J. Am. Jud. Soc. 79 (1942). Other references to the operation of the "one-man grand jury" are found in Gallagher, "The One-Man Grand Jury—A Reply," 29 J. Am. Jud.

cernible to the historian of legal institutions, the Michigan statute has been viewed and applied in large measure as an autochthonous grant to elected judges of extraordinary powers to act simultaneously as detectives, magistrates, and twenty-three man grand juries.

Designed by its framers to be used in "probing frauds, conspiracies and the more insidious forms of violations of law, with which the ordinary police organization is usually powerless to deal,"[8] the "one-man grand jury" statute has been repeatedly employed during the three decades of its existence in cases which have engendered great public interest and excitement because of the prominence or notoriety of the participants, the surcharged political atmosphere of the investigation, the cinematic character and scope of the suspected offenses or other factors which not only appeal dramatically to public opinion but which may also be assumed to have an inescapable if immeasurable effect upon judicial perspectives.

Thus, the first case submitted to the court below in which a "one-man grand jury" investigation had been conducted was a criminal conviction of a township supervisor for keeping fraudulent official records. *People v. Wilson,* 205 Mich. 28 (1919). Thereafter, cases arose involving charges of graft in the affairs of the Detroit board of water commissioners, *Oakman v. Recorder of Detroit,* 207 Mich. 15 (1919); malfeasance of the mayor of Bay City, *Mundy v. McDonald,* 216 Mich. 444 (1921); and restraint

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(footnote continued)

Soc. 20 (1945); Marsh, "Michigan's One-Man Grand Jury," 8 J. Am. Jud. Soc. 121 (1924); Dession and Cohen, "The Inquisitorial Functions of Grand Juries," 41 Yale L. J. 687, 689-692 (1932); Reports of the Special Committee to Study and Report Upon the One-Man Grand Jury Law, State Bar of Michigan, 26 Mich. St. B. J. 55 (1947).

[8] Proceedings of the Twenty-Sixth Annual Meeting, The Michigan State Bar Association 101, 104 (1916).

of trade by a large group of Detroit commission merchants, *People v. Butler*, 221 Mich. 626 (1923).[9] The celebrated investigation of the House of David in Benton Harbor produced the first division in the court below on the exercise of the contempt power by "one-man grand jurors." *People v. Doe*, 226 Mich. 5 (1924). See also *Hansel v. Purnell*, 1 F. (2d) 266 (C. C. A. 6th, 1924), for a history of the investigation.[10]

Widespread investigations of attempted election frauds were later made in Detroit pursuant to the "one-man grand jury" statute, *In re Investigation of Recount*, 270 Mich. 328 (1935) and resulted in the conviction of a numbero of political figures, *People v. O'Hara*, 278 Mich. 281 (1936). See also *In re Wilkowski*, 270 Mich 687 (1935). False testimony in a one-man grand jury investigation of activities of the Black Legion in Genesee County gave rise to a conviction for perjury which also was affirmed by an equally divided court. *People v. St. John*, 284 Mich. 24 (1938).

It was under the vigorous influence of then Wayne Circuit Judge Homer Ferguson that the one-man grand jury reached its climactic flowering in 1939-1942. Armed with a large staff of investigators, accountants, detectives and legal counsel, continuing its investigations over years, the "one-man grand jury" ranged from examining professional racketeering and Purple Gangsterism to corruption in the highest public offices in the City of Detroit and in Wayne County. Convictions were many and impressive

[9] The *Butler* case is discussed by the trial judge in Marsh, "Michigan's One-Man Grand Jury," 8 J. Am. Jud. Soc. 121 (1924) which also reviews other instances of use of the one-man grand jury in Detroit.

[10] This and other one-man grand jury investigations are discussed in Winters, "The One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 141-143 (1945).

and the "law of one-man grand juries" grew apace.[11] Later important investigations have been initiated to deal with corruption in the State government and to investigate "labor rackets."[12]

If cases arising from such important and widespread investigations do not tend to make "bad law," they have at least tended to obscure close analysis of the powers and limitations upon the powers of judges conducting "one-man grand jury" inquiries. Where guilt has been established by a jury, frequently after long and expensive trials, convicted appellants have been told that their objections are baseless or that irregularities are harmless

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[11] The following cases arose from this investigation: *In re Watson*, 293 Mich. 263 (1940); *In re Schnitzer*, 295 Mich. 736 (1940); *In re Ward*, 295 Mich. 742 (1940); *In re Cohen*, 295 Mich. 748 (1940); *People v. Ewald*, 302 Mich. 31 (1942); *People v. McCrea*, 303 Mich. 213 (1942); *cert. den.*, 318 U. S. 783; *People v. Wilcox*, 303 Mich. 287 (1942); *People v. Malone*, 303 Mich. 297 (1942); *People v. Staebler*, 303 Mich. 298 (1942); *People v. Stambaugh*, 303 Mich. 300 (1942); *People v. Way*, 303 Mich. 303 (1942); *People v. Scaduto*, 303 Mich. 307 (1942); *People v. Garska*, 303 Mich. 313 (1942); *People v. Kent*, 304 Mich. 148 (1943); *People v. Robinson*, 306 Mich. 167 (1943); *People v. Millman*, 306 Mich. 182 (1943); *People v. Roxborough*, 307 Mich. 575 (1943); *People v. Watson*, 307 Mich. 596 (1943); *People v. Ryan*, 307 Mich. 610 (1943); *People v. Reading*, 307 Mich. 616 (1943); *People v. Ryckman*, 307 Mich. 631 (1943); *Aller v. Detroit Police Dept. Trial Board*, 309 Mich. 382 (1944); *People v. Woodson*, 309 Mich. 391 (1944); *People v. Norwood*, 312 Mich. 266 (1945); *People v. Heidt*, 312 Mich. 629 (1945); *People v. Bartlett*, 312 Mich. 648 (1945); *People v. Clark*, 312 Mich. 665 (1945). See also "Unprecedented Success in Criminal Courts," 26 J. Am. Jud. Soc. 42 (1942).

[12] In the first of these investigations Ingham Circuit Judge Carr served as grand juror and Kim Sigler acted as special prosecutor. The former is now chief justice of the court below and the latter is governor of Michigan. See, for cases proceeding from this investigation, *In re Slattery*, 310 Mich. 458 (1945), cert. den., 325 U. S. 876; *Kloka v. State Treasurer*, 318 Mich. 87 (1947); See also *Hemans v. U. S.*, 163 F. (2d) 228 (CCA 6th, 1947). *People v. DenUyl*, 318 Mich. 645 (1947). The single reported case arising from the "labor rackets one-man grand jury" conducted by Wayne Circuit Judge George B. Murphy is *People v. Hoffa*, 318 Mich. 656 (1947).

and non-prejudicial. See, e. g. *People v. McCrea*, 303 Mich. 213 (1942), *cert. den.*, 318 U. S. 783; *People v. Stambaugh*, 303 Mich. 300 (1942); *People v. Wilcox*, 303 Mich. 287, 296 (1942). This has resolved particular cases to the satisfaction of some segments of the public and press, but it has left in confusion the essential character of the "grand jury" proceeding.

In an early case the court below cautiously referred to such an investigation as a judicial proceeding for the discovery of crime in which the judge acted "either as a conservator of the peace or in the exercise of powers analogous to those possessed by grand juries." *Oakman v. Recorder of Detroit*, 207 Mich. 15, 23 (1919). There a "presentment" of the judge, filed before any warrant was issued and containing serious charges against a public officer, was stricken from the files of the court of which the grand juror was a member, it being held that such public disclosure was inconsistent with the obligation of secrecy imposed upon grand jurors.

Yet, when it was sought in a similar situation to recover for damages for libelous statements contained in the publicized "findings" of a "one-man grand juror," it was held that judicial immunity barred recovery since the grand juror was acting throughout "as circuit judge." *Mundy v. McDonald*, 216 Mich. 444 (1921). In *People v. Doe*, 226 Mich. 5 (1924) the inquiry was referred to both as a "John Doe proceeding" (p. 6) and as an "investigation by a judge sitting as a grand jury" (p. 8). In *People v. St. John*, 284 Mich. 24, 33-34 (1938), four members of the court below took occasion to observe:

> "It is somewhat of a misnomer to term the proceedings a 'one-man grand jury,' for it is special and does not confer the general powers of a grand jury. The statute provides for a special investiga-

> tion under a complaint of the commission of an alleged crime; it does not authorize a grand inquest, with power of roving inquiry and presentment of offenders generally. When the statutory authority is properly invoked it operates in a specific instance as an aid toward bringing criminal offenders to trial."

Nevertheless, the court later indicated that despite such objection, the term "one-man grand jury" is aptly descriptive of the function performed and would continue to be officially employed. *In re Slattery*, 310 Mich. 458, 461 (1945), *cert. den.* 325 U. S. 826. In fact, the court below has regarded the investigating judge as so much a "grand juror," that it has held applicable to him a century-old statute covering "members of the grand jury."[13]

While the judge, exercising the "broad investigatorial powers" of a grand jury, *United States v. Johnson*, 319 U. S. 503, 510, is thus free to inquire into offenses concerning which no specific charges have been filed, *People v. St. John*, 284 Mich. 24, 28 (1938), or to issue a warrant covering a crime subject to the exclusive jurisdiction of another

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[13] C. L. 1929, §17233, Mich. Stats. Ann., §28.959, provides that "Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such jury is consistent with, or different from the evidence given by such witness before such court * * *." In upholding convictions following "'one-man grand jury" investigations, the court below has pointed out that because the statute permits interrogation of the "one-man grand juror" the defendants could have taken this means to compensate for denial to them of the right to cross-examine witnesses as to their testimony before the "grand jury." *People v. McCrea*, 303 Mich. 213, 244-246 (1942), *cert. den.* 318 U. S. 783; *People v. Butler*, 221 Mich. 626, 630-631 (1928). Cf. also *People v. Norwood*, 312 Mich. 266, 274 (1945); *People v. Karoll*, 315 Mich. 423, 431 (1946). On the other hand, C. L. 1929, §17231, Mich. Stats. Ann. §28.957, which contemplates that the work of a grand jury shall be performed during a single term of court, has never been applied to limit "'one-man grand jury" investigations which, as in the instant case, have extended over more than twelve terms of court. Cf. *United States v. Johnson*, 319 U. S. 503.

court, *People v. Ewald,* 302 Mich. 31, 39-40 (1942), *In re Hickerson,* 301 Mich. 278, 281-282 (1942), or which has been committed outside of the territorial jurisdiction of the circuit court of which the judge is a member, *McComb v. City Council of City of Lansing,* 264 Mich. 609, 612 (1933), the logical conclusion that the judge is performing other than his regular judicial functions may not, it seems, be indulged. The contention that the statute confers upon judges responsibilities which are not judicial, cf. *Matter of Richardson,* 247 N. Y. 401 (1928), has been repeatedly rejected. *In re Slattery,* 310 Mich. 458, 466-468 (1945), *cert. den.* 325 U. S. 876; *Kloka v. State Treasurer,* 318 Mich. 87, 90 (1947). The judge conducting such an inquiry, the court asserted somewhat archly in the *Slattery* case (p. 466), is "neither a prosecuting attorney, policeman or detective."

The force of this conclusion has hardly been augmented by repetition. Although the "one-man grand juror" is not to be denominated a "prosecutor," he is still free to summon a suspect or a witness in the middle of the night,[14] bring him to a private meeting place or "hide-out" far from any courtroom,[15] hold him incommunicado,[16] refrain

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[14] This practice is admittedly common. See report of Special Committee to Study and Report Upon the One-Man Grand Jury Law, 26 Mich. St. B. J. 55, 60 (1947).

[15] The Ferguson "grand jury" had as many as two such "hide-outs" in addition to a secret suite in a large Detroit office building. Winters, "The Michigan One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 143 (1945). Taking testimony of witnesses in their private homes, at the residences of staff members or in hotel rooms, the investigation became known as the "portable grand jury." "Unprecedented Success in Criminal Courts," 26 J. Am. Jud. Soc. 42 (1942).

[16] It has frequently been contended that persons have been kept in custody by one-man grand juries without warrant or the filing of charges against them and prevented from communicating with counsel or their families for long periods. In fact, the use of third degree methods has also been alleged. It does not appear that such charges have been considered in any reported opinion of the court below.

from advising him of his privilege against self-incrimination, *People v. Butler*, 221 Mich. 626, 631-632 (1933), and interrogate him on any subject whatever, *People v. Wolfson*, 262 Mich. 409, 413 (1933); *In re Watson*, 293 Mich. 263, 269 (1940), in secret session and in the absence of counsel. The judge is no mere passive "referee" in such proceedings but furnishes active and controlling leadership. He may proceed with an investigation even when the county prosecutor and the state attorney-general fail or refuse to participate, *In re Investigation of Recount*, 270 Mich. 328, 331 (1935), and he is not bound by statutory restrictions upon the issuance of warrants without the recommendation of the prosecuting attorney of the county.[17] Likewise, although he is not a prosecutor, policeman or detective, he is free to employ such assistants as he may desire, *In re Investigation of Recount*, 270 Mich. 328, 331 (1935), and maintain staffs of investigators, special prosecutors police officers and other aides at public expense, *In re Slattery*, 310 Mich. 458, 479 (1945), *cert. den.* 325 U. S. 876,[18] who are regularly present at secret grand jury sessions. Nor has it been felt by "one-man grand

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[17] C. L. 1929, §17135, Mich. Stats. Ann., §28.860 prohibits circuit judges from issuing a warrant "until an order in writing is filed with such public officials and signed by the prosecuting attorney for the county, or unless security for costs shall have been filed with said public officials." In *People v. O'Hara*, 278 Mich. 281, 293 (1936) the statute was held inapplicable to "one-man grand jury" proceedings, the court adding that "in any event the claimed irregularity [issuance of warrant without order from prosecutor or posting of security for costs] was not jurisdictional."

[18] The following expenditures of the "$100,000 labor rackets one-man grand jury" of Wayne County are indicative of the proportions which such investigations have assumed. Irrespective of services furnished by regular law enforcement officers assigned to the investigation, the grand jury reported that its chief "special assistant attorney general" received a salary for an eleven-month period of $25,562.50, three assistants received a total of $17,545.42, plane, railroad, taxicab, garage rental, parking and other transportation expenses aggregated $9,424.43 and "meals" and "hotel" charges exceeded $5,000 of more than $95,000 admittedly

jurors" that they are bound by normal standards of judicial reticence when conducting such inquiries. Even the most ardent champions of the Michigan system acknowledge that "the criticism is sometimes heard that the judge so acting makes himself a newspaper hero for political purposes." "Improvements on Grand Jury Procedure," 28 J. Am. Jud. Soc. 46 (1934). This criticism has recently resounded with "echoing impressiveness."[19]

Because the contours of this investigative process, despite thirty years of experience with the Michigan statute, remain so ill-defined, it is easily understood why the system can mean "all things to all men." Its partisans emphasize vehemently its efficiency and effectiveness in uprooting crime,[20] while its opponents see it as an anomaly

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(footnote continued)

spent. Detroit Free Press, May 28, 1947; Detroit Times, May 27, 1947; Detroit News, May 27, 1947. Other similar investigations have pridefully reported that they have been "self-supporting" in that fines for convictions and contempts have equalled or exceeded the costs of the inquiry. *Cf. Tumey v. Ohio*, 273 U. S. 510.

[19] The indiscriminate issuance of press releases, interviews, threatening or self-gratulatory statements and other publicity by "one-man grand juries" has become so common that it was expresly condemned by the special committee of the State Bar of Michigan which recently reexamined the system which its predecessor organization had introduced. Report of Special Committee to Study and Report Upon the "One-Man Grand Jury Law," 26 Mich. St. B. J. 55, 62 (1947). The attorney-general of Michigan has also charged one grand juror with issuing indictments without foundation or "evidence to back them up" to gain publicity for his campaign for re-election as circuit judge. Detroit News, p. 2, col. 1, June 16, 1947.

[20] The Detroit Citizens League has from time to time rendered enthusiastic support to these inquiries. See an article by its late president, Lovett, "One-Man Grand Jury in Action," 33 Nat'l. Munic. Rev. 292 (1944). The American Judicature Society as early as 1920 asserted that Michigan had "solved the grand jury problem satisfactorily." "Grand Jury Reform," 4 J. Am. Jud. Soc. 77, 81 (1920). See also "Improvements on Grand Jury Procedure," 28 J. Am. Jud. Soc. 36 (1934); "Grand Jury Encumbers Justice in Many States," 23 J. Am. Jud. Soc. 25, 26 (1939); "Unprecedented Success in Criminal Courts," 26 J. Am. Jud. Soc. 42 (1942).

which attains "results" only at the expense of constitutional liberties.[21] The court below has given few express clues as to how the system may be safeguarded without sacrifice of civil rights; investigation fails to disclose a single case involving any phase of grand jury activity sanctioned in a lower court, which has been reversed in the Supreme Court of Michigan. On the contrary, the single amendment to the basic statute was passed after the repeated refusal by the court to require "one-man grand jurors" who had issued indictments to disqualify themselves at the preliminary examination of the accused from passing upon the sufficiency of such indictments or the evidence upon which they were predicated.[22]

B. Role of the Contempt Power.

While the court below has been equally reluctant to announce any limitations upon "one-man grand juries" in their exercise of traditional judicial powers to punish for contempt, this power—in fact or *in terrorem*—is the fulcrum of the entire investigative process. A witness is called in response to a subpoena, put upon his oath, and warned that refusal to testify will expose him to summary punishment for contempt, and that false or evasive answers will receive similar treatment. Deprived of the protection of counsel, frequently interrogated in a hostile

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[21] See the opinion of Professor Edson R. Sunderland that the grand juror's functions are "inconsistent with the impartiality which ought to characterize the judicial office," and other critical remarks collected in Winters, "The One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 146 (1945). To the same effect is Gallagher, "The One-Man Grand Jury—a Reply," 29 J. Am. Jud. Soc. 20 (1945).

[22] See *People v. McCrea*, 303 Mich. 213, 248-249 (1942), *cert. den.* 318 U. S. 783; *People v. Roxborough*, 307 Mich. 575, 580 (1943), now obsolete by reason of House Enrolled Act No. 31, 64th Legislature, Reg. Sess., 1947.

atmosphere and under the least favorable of conditions, and no less frequently ignorant of the privilege against self-incrimination, the witness is placed in a "vise" from which release is difficult.[23] Any rights he may conceive he has at such *in camera* sessions can only be protected by defiance of the "one-man grand juror" and exposure to the very consequences which it is sought to avoid. Even when the witness maintains his position, suffers sentence for contempt, and prosecutes review upon application for extraordinary writs, he is confronted with carefully selected portions of the transcript of the grand jury proceedings set out in the return of the officer whose decision has been challenged,[24] and is called upon to establish to the satisfaction of the court below that there is no "competent evidence," *People v. Wolfson*, 264 Mich. 409, 414 (1933), or no "evidence to support the finding" of the grand juror. *In re Oliver*, 318 Mich. 7, 13 (1947); *People v. Doe*, 226 Mich. 5, 11-12 (1924).

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[23] See Winters, "The Michigan One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 148 (1945). This was corroborated by Hon. George B. Murphy, "'labor rackets one-man grand juror,' testifying as a witness in *People v. Kopek, et al.*, No. 24616, Wayne Circuit Court, who stated that it was his regular practice to indicate the penalties for contemptuous refusal to answer questions, evasiveness or false testimony but not to inform witnesses (including those against whom the investigation was directed) that they had a constitutional privilege to withhold information which could spell their own doom in the criminal courts.

[24] See *In re Slattery*, 310 Mich. 458, 463 (1945), *cert. den.* 325 U. S. 876, where the return of the grand juror, as in the instant case, did not set forth the entire testimony of the witness but only selected portions. The court there observed that this was "obviously" justified by the secret nature of the proceedings. Yet, in *People v. Karoll*, 315 Mich. 428, 431 (1946) the unfairness to a defendant of being forced to face "isolated" portions of his testimony was recognized and regarded as prejudicial. The opinions below do not advert to the question here. The record before the "grand juror" is subject to his control in any event; it has been charged in unchallenged affidavits in two pending lower court cases that "the labor-rackets one-man grand jury" frequently interrogated witnesses "off the record" and barred the official stenographer from vital parts of the proceedings. *People v. Kopek, et al.*, No. 24616, Wayne Circuit Court; *People v. Carroll*, No. A 48038, Detroit Recorder's Court.

Refusal of a witness to answer a question put by a grand juror is regarded as contemptuous even when based upon a misapprehension of the precise limits of constitutional privilege or the scope of statutory immunity.[25] The language of the grand jury statute is also available to authorize punishment for contempt when a witness refuses to respond to a subpoena.[26] But though the statute enumerates no other grounds for summary contempt citations by grand jurors, the court below has, upon general notions of the common law, extended the contempt powers of grand jurors to punish "evasive" conduct[27] and false swearing.[28] "Coufts should not be trifled with," it has declared; since refusal to answer a proper question is contemptuous, "the refusal to answer truthfully imports greater moral turpitude and should likewise be held to be contempt." *People v. Doe*, 226 Mich. 5, 17 (1924). Punishment of such conduct, *ergo*, is said to be a traditional prerogative available to a grand juror because he is a "judicial" officer.

The procedure to be observed in thus "vindicating" the authority of a "grand juror" is sufficiently flexible to permit consistent affirmance of every "one-man grand jury" commitment for contempt. Thus while a state senator's

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[25] *In re Watson*, 293 Mich. 263 (1940); *In re Schnitzer*, 295 Mich. 736 (1940); *In re Ward*, 295 Mich. 742 (1940); *In re Cohen*, 295 Mich. 748 (1940). See also *Matter of Bommarito*, 270 Mich. 455 (1935).

[26] *In re Wilkowski*, 270 Mich. 687 (1935). The "grand jury" statute authorizes sentences for contempt to secure obedience when the witness neglects or refuses to appear to answer any question on a matter deemed material to the inquiry. C. L. 17219, Mich. Stats. Ann., §28.944.

[27] *In re Slattery*, 310 Mich. 458 (1945), *cert. den.*, 325 U. S. 876; *In re Hartley*, 317 Mich. 441 (1947).

[28] *People v. Doe*, 226 Mich. 5 (1924); *People v. Wolfson*, 264 Mich. 409 (1933). False testimony before a "one-man grand juror" is also the basis of a criminal prosecution for perjury. *People v. St. John*, 284 Mich. 24 (1938).

refusal to appear as a witness is a "criminal" contempt of the grand jury rather than a "civil proceeding" in which legislative immunity may be asserted, *In re Wilkowski,* 270 Mich. 687 (1935), a proceeding against a witness for giving false answers to a grand juror may not be regarded as "criminal" for then, the court has said, the witness would be entitled to a trial by jury before being jailed for sixty days. *People v. Doe,* 226 Mich. 6, 18 (1924). If the judge sentences a witness for "contempt of court" in his capacity as a "grand juror" presiding over a secret investigation, the regularity of the procedure is no more doubted than when the judge meticulously avoids exercising the contempt power as "grand juror" and convenes a "circuit court" for the purpose of imposing sentence. Two years ago it was observed, *In re Slattery,* 310 Mich. 458, 479 (1945), *cert. den.,* 325 U. S. 876:

> "It was proper for Judge Carr to make the order finding petitioner guilty of contempt, not as a one-man jury but as a circuit judge. It would have been an idle gesture for him to have the record of a case in which he had sat, first written up and then submitted to himself."

More recently, however, *In re Hartley,* 317 Mich 441, 444 (1947), a case related to the present one, which involved a fellow pinball operator in Oakland County, the prevailing opinion of the court below indicated:

> "While, in the *Slattery Case,* the judge adjourned the one-man grand jury proceeding and then reconvened as a circuit court before adjudging the witness guilty of contempt, in effect he was still acting as a grand jury. He made an adjudication based on his personal knowledge of what had transpired before him as a one-man grand jury. No record of the pertinent grand jury proceedings was transcribed and presented to him as a circuit judge.

> That, we held, would have been an idle gesture. It would be an equally idle gesture to require such adjournment of the grand jury and its reconvening as a circuit court. The circuit judge, while acting as a one-man grand jury, may in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith."

By reason of these definitive interpretations of the Michigan statute by the Supreme Court of Michigan, the "one-man grand juror" must be recognized as a justice of the peace, police judge or judge of a court of record" who is empowered to direct comprehensive crime-detection enterprises behind closed doors, peremptorily to summon and interrogate witnesses on any subject deemed pertinent to the investigation of any criminal offense, without permitting such witness to be represented by counsel, and simultaneously to exercise the broadest powers of contempt historically limited to judicial officers conducting purely judicial proceedings. Distinctions between acts of a judge as "grand juror" and as a member of a duly constituted court are, under these decisions, to be dismissed as "idle" and irrelevant. So construed, the statute is presented to this Court for measurement in the light of the beneficent exactions of the Fourteenth Amendment.

C. Violation of Due Process.

In the case at bar, petitioner was sentenced to the Oakland County Jail for two months without notice or hearing, save as these basic requirements of procedural due process may have been fulfilled by the oral anouncement of the "grand juror" that in his opinion petitioner's testimoy "doesn't jell" (R. 14), and that it was, accordingly, unworthy of belief. Petitioner was not informed of the nature of the charges against him save as the grand

juror indicated to his jailer that he had answered questions "evasively" (R. 16) and to the court below that petitioner had given "false and evasive answers concerning the status of the whereabouts" of the bonds (R. 9). The "falsity" of any answers was never proved and their evasiveness was found by the prevailing four members at the court below to be supported by "evidence" inherent in the answers themselves. Petitioner never received a trial by jury nor, indeed, an opportunity before he was jailed to present his position through an attorney at an open session of a competent court of the state. Rather, petitioner was placed in custody on September 11, 1946 and remained there for three days before the sheriff was advised of the reason for his detention (R. 15) after proceedings had been instituted to secure his release (R. 2-3).

The grand juror contended in his answer that petitioner's statement that he had destroyed the "bonds" he admitted buying from Mitchell was false (R. 3), although upon the record this assertion never rises above the level of his own subjective suspicion. What is more, petitioner's unchallenged affidavit indicates that he identified a duplicate of the "bond" purchased from Mitchell (R. 17) in the course of his testimony before the "grand jury." If the "grand jury" had a duplicate of the document, it is difficult to see how petitioner "impeded the progress" of the "grand jury" by refusing information "which would enable the Grand Jury to discover said bonds," as the "grand juror" charged (R. 3). The "grand juror's" return does not complain of insolent replies by petitioner, protestations of forgetfulness or lack of familiarity with the obvious. Petitioner, it is true, was unable in September, 1946 to recall with the certitude demanded by his interrogators, how he had disposed of documents purchased in September 1944 when they expired at the end of the year (R. 10-11).

This, presumably, was the basis of the claim in the order of commitment that petitioner "repeatedly gave contradictory answers to the same questions" (R. 16). When petitioner was first asked what method he had used to destroy the bonds which he had said he saw no need to preserve after they had expired (R. 11), he stated "Well, I don't know off-hand just what I did do with them, whether I burned them or threw them out. I must have threw them out" (R. 11). When this portentous subject was pursued a moment later by the grand juror, petitioner answered, "I just got rid of them. I imagine I threw them into the waste paper basket. That is what I usually do. I get lots of circulations, papers, things that I have no use whatever for, threw them in the waste paper basket" (R. 11). Finally, a moment later, upon the third relentless effort, the questioner elicited this reply, "The only—I couldn't say what I did do. Probably threw them in the trash can" (R. 11).

This testimony demonstrates that petitioner lacked both fanatic curiosity and mnemonic concern for the techniques of waste paper disposal, but it can hardly provide serious justification for a summary commitment to jail for two months. Where a witness deliberately attempts to "fob off inquiry," he may be punished, a majority of the court below has held, *In re Hartley*, 317 Mich. 441, for direct contempt because the "grand juror," like the court in *United States v. Appel*, 211 Fed. 495 (S. D. N. Y., 1913), may protect itself from a "transparent sham." Petitioner's testimony was less than "transparent" to one-half of the justices of the court below.[20] In any event, aside from the

[20] "The power to punish for contempt, it was said in *United States v. McGovern*, 60 F. (2d) 880, 889 (C. C. A. 2nd, 1932), "does not reside in the court to compel a witness to testify in accord with the Court's conception of the truth." See also *Blim v. United States*, 68 F. (2d) 484, 488 (C. C. A. 7th, 1934).

ipse dixit of the "grand juror," there is nothing to justify a conclusion that petitioner's inability to reply to a series of questions on an issue which is gratuitously declared "material to such inquiry,"[30] was conduct "directly tending to interrupt" the proceedings before the grand juror or to "impair the respect due" to his authority—elements required by the general Michigan contempt statute C. L. 1929 § 13911, Mich. Stats. Ann., § 27.511, or that petitioner's conduct obstructed the grand jury in the performance of its duties—an equally indispensable ingredient of the conclusion in the *Appel* case. See *Ex Parte Hudgings*, 249 U. S. 378, 383; cf. *Clark v. United States*, 289 U. S. 1, 11.

This case comes from the court below without the protective armor of a supporting declaration of Michigan legislative policy. Cf. *Bridges v. California*, 314 U. S. 252, 260. Insofar as the Michigan legislature has spoken in its "one-man grand jury" statute, it has specifically conferred upon grand jurors the power to impose sixty-day jail sentences as punishment for contempt only when witnesses refuse to heed a properly served subpoena or when they refuse to answer a question upon a material issue. Insofar as the legislature has spoken in statutes regulating the general powers of "courts" to cite for contempt, the power has been confirmed only for courts of record—whose judges are not the only judicial officers permited to act as grand jurors. Under C. L. 1929 § 13910, Mich. Stats. Ann., § 27.511 a court of record may redress

[30] It has been suggested in some cases that even deliberately false statements may not be made punishable as contempts unless they are material to the issues in the matter before the court. *Hegelay v. State*, 24 Ohio App. 103, 108 (1927); *Gold Sign Co. v. Cosmas*, 124 Misc. (N. Y.) 877, 879 (1925); discussed *In re Gottman*, 118 F. (2d) 425, 427 (C. C. A. 2nd, 1941).

> "disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority * * * or any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings * * *."

The statute also authorizes the summary punishment of misconduct "committed in the immediate view and presence of the court by fine or imprisonment, or both, as hereinafter prescribed." C. L. 1929 § 13911, Mich. Stats. Ann., § 27.512. "In no case," it is then provided, shall such punishment by fine exceed $250 "nor the imprisonment thirty (30) days; except in those cases where the commitment shall have been for refusal to perform an act or duty which is still within the power of the party to perform." C. L. 1929 § 13939, Mich. Stats. Ann., § 27.530. For misconduct not in the "immediate view and presence of the court," the facts charged shall be presented in affidavit form, a copy thereof is to be served upon the accused who shall have "a reasonable time to enable him to make his defense." C. L. 1929, § 13912, Mich. Stats. Ann., § 27.513.

These statutes are not substantially different either in language or intention from corresponding Congressional restrictions upon the Federal courts. In such cases as *Nye v. United States*, 313 U. S. 33, this Court has emphasized that the limited power of a court to protect itself from direct, obvious and fundamental challenges to its authority cannot be used to supplant established procedures for redressing criminal acts. In fact, where the contempt power was invoked against a witness who was accused of false testimony before a federal grand jury, *In re Michael*, 326 U. S. 224, 227, it was pointed out that the exercise by federal courts of any broader contempt power than what was called "the least possible power adequate

to the end proposed" would "permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury." See also *Ex Parte Hudgings*, 249 U. S. 378, 383-384.

The prevailing opinion of the court below appears to conclude that there was evidence that petitioner was "evasive" in his replies, that such misconduct obstructed the due administration of justice, that it was in the "immediate view and presence of" a court. Of course, in reviewing state action of this kind, this Court is not bound by the factual conclusions of the state court in determining whether the alleged contemnor was denied rights to which he was entitled under the Fourteenth Amendment. *Craig v. Harney*, 331 U. S. 367, 373-374; *Pennekamp v. Florida*, 323 U. S. 331, 368. This would seem particularly true when the judgment is based not upon a deliberate legislative command but, as here, upon the same "common law concept of the most general and undefined nature" as that involved in *Bridges v. California*, 314 U. S. 252, 260. Cf. also *Cantwell v. Connecticut*, 310 U. S. 296, 308.

Unlike the defendants in the *Bridges*, *Craig* and *Pennekamp* cases, or the petitioners in *Ex Parte Hudgings*, 249 U. S. 378, and *In re Michael*, 326 U. S. 224, petitioner here did not receive even the bare opportunity to have his attorney present his position as to how such an amorphous common law concept was to be interpreted and applied to the facts disclosed by the record. The grand juror who was the object of the "contemptuous" action was also the official who passed judgment sentencing petitioner to jail for sixty days, cf. *Cooke v. United States*, 267 U. S. 517, 539, and judgment was passed and petitioner was in custody for three days before his at-

torney, who had not been allowed to confer with him (R. 3), could ascertain that no order for his commitment had been issued (R. 3). Like another victim of official Michigan overzealousness, petitioner was "hurried through unfamiliar legal proceedings without a word being said in his defense." *De Meerleer v. Michigan*, 329 U. S. 663, 665. Like De Meerleer, we believe, he was deprived of "rights essential to a fair hearing under the Federal Constitution." Cf. *Powell v. Alabama*, 287 U. S. 45, 69.

Unless a contempt has been committed "in open court," this Court has unequivocally held that "due process of law" requires that

> "the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." *Cooke v. United States*, 267 U. S. 517, 537.

In the instant case, petitioner not only received no hearing before he was jailed, but in the court below his conviction was affirmed without proof of any sort that he made a single misstatement to the grand juror, without apparent consideration of the materiality to the grand jury inquiry of the questions concerning the methods petitioner used to destroy the "bonds," and after a specific denial of his motion to have all of his testimony considered (R. 19) for the purpose of showing exculpation or extenuation of the offense and mitigation of the penalty. Where the judge cannot have personal knowledge of the truth or falsity of statements made by a witness, and is informed only by the confession of the contemnor or testimony of other witnesses, an order to show cause speci-

fying the alleged misconduct must first be issued to permit the accused opportunity to be heard. See *Savin, Petitioner*, 131 U. S. 267, 277; *Ex Parte Terry*, 128 U. S. 289, 307. When the contempt charged is not of the character punishable summarily, absence of a hearing is fatal to the judgment. See *Bowles v. United States*, 44 F. (2d) 115, 188 (C. C. A. 4th, 1930)

In our view, the minimum requirements of "due process" do not countenance seductive analogies which obscure the fundamental differences between a duly constituted tribunal conducting a public trial and a judge presiding at a secret inquisitorial session behind doors barred to attorneys, newspaper reporters and curious spectators alike. The historical exception to ordinary criminal procedural requirements under which a tribunal may summarily prevent or redress disorder in the courtroom or conduct directly impairing management or control of a pending controversy at the bar of justice has been recognized for the very purpose of preserving minimum standards of "due process of law."[21] Flamboyant defiance of such a tribunal in regular open session, if allowed to go unchecked, may, indeed, result in undermining public respect and confidence in the "rule of law." But it is a defiance of the realities to assume that the same consequences ensue in a secret grand jury investigation of the type undertaken by a judge pursuant to the Michigan statute. If petitioner, at such investigation, demonstrated forgetfulness, lack of clarity in his answers or lack of sympathy for the objects of the investigation, none was to know how irritating or disrespectful his conduct was except

[21] See Radin, "Freedom of Speech and Contempt of Court," 36 Ill. L. Rev. 599, 610 (1942). Cf. also "Summary Contempt Proceedings v. The Fourteenth Amendment," 27 Va. L. Rev. 665 (1941); Nelles, "The Summary Power to Punish for Contempt," 31 Colum. L. Rev. 956 (1931).

those present in the grand juror's chambers. If petitioner was giving "false" testimony under oath, there was nothing to prevent his indictment for perjury; in such a prosecution, if his accusers could confront him with proof sufficient to establish his guilt, he faced sterner penalties than those imposed here.[22] There is nothing in the record which suggests that Judge Hartrick's investigation, which had called petitioner as a witness six months earlier (R. 17), was in danger of being impaired by reason of being "fobbed off" for the few days needed by the grand juror to recover from his illness (R. 10), to prepare specific charges against petitioner, and to order a hearing of such charges in open court at which petitioner could have been represented by an attorney of his choice.

What this record does disclose, however, is a surprising readiness upon the part of Michigan judges to commit a witness to jail because he fails to tell a story which was expected or desired of him. Such a phenomenon can hardly be viewed apart from the "grand jury" system which gives it birth. Had petitioner in this case given the identical testimony from a witness stand in response to questions of a prosecuting attorney in a public "judicial proceeding," it is unthinkable that a responsible judge would have assumed to commit him to jail because of his admitted inability to assert with confidence that he had thrown worthless papers into a waste paper basket rather than an incinerator many months before. But when the committing judge is also the interrogator, and when the

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[22] The perjury statute punishes false testimony under oath in a "court of justice" by long prison terms. Section 422 Penal Code, Mich. Stats. Ann., §28.664. This statute has been held applicable to false swearing in a "one-man grand jury" proceeding. *People v. St. John*, 284 Mich. 24 (1938). See also Section 423 Penal Code, Mich. Stats. Ann. §28.665, containing a broader definition of the crime, made punishable by a maximum fifteen year prison term.

interrogation takes place behind closed doors in a proceeding which is "*ex parte*," appeals to immemorial and inherent powers to punish for direct contempt become peculiarly contagious to the liberties of the citizen which the Fourteenth Amendment was designed to safeguard. In a state where success as a grand juror is frequently rewarded by high public office, there is a very real temptation to let prosecutive zeal in obtaining convictions obscure sensitivity to minimum standards of decency and fairness which cannot, under our system, be forsworn however inconvenient or irritating to law enforcement officials they may be. Cf. *Buchalter v. New York*, 319 U. S. 427, 429. However much the excesses of journalism may nettle the administration of justice, the absence of "free" publicity —public praise or blame—makes secret "grand jury" proceedings highly susceptible to overpersonalized judicial action. For all the difficulaties which adversary trials engender, a case such as this abundantly confirms that the presence of an attorney representing an accused serves as a "brake" upon hasty or wrathful exercise of official power. The requirement that criminal charges be sufficiently definite to be informative has an almost perfunctory significance until, in a situation worthy of Kafka, a man is sent to jail for two months for speaking "falsely" on a matter which is never identified, and for being "evasive" on a detail of behavior which, if lingeringly remembered, would suggest psychiatric rather than penal treatment.

While the states are free to determine their own legal institutions and to devise, if they can, new and more effective methods for the discovery and prosecution of crime, such ingenuity cannot transgress constitutional limits or countenance deprivation of those procedures which a long history has shown indispensable to ordered liberty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that petitioner was denied due process in being summarily adjudged guilty of contempt of a secret "one-man grand jury" and being deprived of his liberty without notice, specification of charges, opportunity to present evidence and be heard through counsel, or proof of any misconduct which would justify even a regularly constituted court in open session from imposing such drastic sanctions. Accordingly, reversal of the judgment against petitioner is prayed.

Respectfully submitted,

DETROIT CHAPTER, NATIONAL LAWYERS GUILD,

HENRY S. SWEENY,
President,

PATRICK H. O'BRIEN,
Chairman, Civil Liberties Committee,

ERWIN B. ELLMANN,
On the brief.

APPENDIX A

The Michigan "One-Man Grand Jury" Statute

Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings. (C. L. 1929, § 17217; Mich. Stats. Ann. § 28943).

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective

or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors (C. L. 1929 § 17218; Mich. Stats. Ann. § 28.944).

Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: *Provided*, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence. (C. L. 1929, § 17219; Mich. Stats. Ann. § 28.945).

No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting

attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him (C. L. 1929, § 17220; Mich. Stats. Ann. § 28.946).

No. 215

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

IN RE WILLIAM OLIVER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR STATE BAR OF MICHIGAN, AMICUS CURIAE

State Bar of Michigan
Harry G. Gault, President

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Special Chairman, Committee
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IN RE WILLIAM OLIVER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR STATE BAR OF MICHIGAN, AMICUS CURIAE

With the permission of the Court given January 5, 1948, the following brief is submitted by the State Bar of Michigan, as *amicus curiae*. The State Bar of Michigan is vitally interested in the constitutionality of the one-man grand jury law of Michigan, which is involved in the instant case.

I

Opinions Below

The opinions delivered in the Michigan Supreme Court are officially reported: *In re Oliver*, 1947, 318 Mich. 7.

The opinions delivered in the Michigan Supreme Court in an earlier and correlated case that presented identical questions are officially reported: *In re Hartley*, 1947, 317 Mich. 441.

II

Jurisdiction

The jurisdiction of this Court was invoked under Section 237(b) of the Judicial Code, as amended, U.S.C. Title 28, Sec. 344(b).

The State Bar of Michigan seriously doubts the jurisdiction of this Court to hear and determine the question whether the return of a portion of the Circuit Court's transcript was a denial of 'due process' (see post, p. 22).

III

Statute Involved

The provisions of Section 17219 Compiled Laws of Mich. for 1929; Sec. 28.944 Mich. Stat. Ann. of the Michigan one-man grand jury law is involved. This section with the other three sections of that law, Sec. 17217-17220 Mich. Comp. Laws; Sec. 28.942-28945, are set forth in Appendix A, infra, p. (35).

IV

Questions Presented

1. Is it a denial of 'due process' to convict a witness of contempt of court summarily and without trial by jury when the misconduct is committed in the immediate presence of a Michigan Circuit Judge, who, in a judicial capacity, pursuant to the law of Michigan, is acting as a one-man grand jury in the conduct of an investigation of suspected criminal offenses?

2. Is it a denial of 'due process' for a Michigan one-man grand jury to convict a witness of contempt of court summarily and without trial by jury for giving evasive answers which are self-evident and material to an investigation of suspected criminal offenses, and thus obstructing justice?

3. Does this Court have jurisdiction to consider and determine the question whether the omission of portions of a transcript upon return by a Circuit Court to the Michigan Supreme Court constitute a denial 'due process' under the 14th Amendment, when it conclusively appears from the record that such question was never raised, considered nor decided by the Michigan Supreme Court?

V

Concise Statement of the Case

The Circuit Court of Oakland County, Michigan granted a petition for the holding of a one-man grand jury investigation (sec. 17217-17220 Mich. Comp. Laws) of 'gambling, operation of gambling devices, bribery of public officers and other crimes' in the County of Oakland. Hon. George B. Hartrick, Circuit Judge, was assigned to conduct the investigation. Hon. Frank L. Doty and Hon. H. Russel Holland, Circuit Judges of Oakland County, were acting in an advisory capacity to Circuit Judge Hartrick, who presided over the one-man grand jury investigation.

In the course of the inquiry, one William Oliver, owner and operator of 50 pin ball machines in Oakland County, was subpoened to appear on September 11, 1946 before Circuit Judge Hartrick pursuant to Sec. 17217 Mich. Comp. Laws. William Oliver appeared before Judge Hartrick

and the other two Circuit Judges of Oakland County. Petitioner Oliver had been previously interrogated in the same investigation on April 3, 1946, about 5 months earlier.

From the testimony of William Oliver his pin ball machines could be operated either legally or could be used for gambling purposes. It is transparent that the primary purpose of the investigation was to ascertain whether there was official misconduct on the part of law enforcing officers and this could, of course, be supplied only by those who participated in bribery for such purpose. The method was somewhat ingenious but simple. In September 1944 one C. E. Mitchell, doing business under the assumed name 'Midwest Bonding Company' (R 9) approached William Oliver who testified that Mitchell induced him to 'buy' certain instruments called 'bonds' which purported to 'guarantee reimbursement' to the county for 'extra' expenses (R 13) of prosecuting persons using the pin ball machines when 'anybody was caught gambling on the machines'. (R 12). Those who 'bought' the 'bonds' were given a 'little sticker' to put on their machines, which would plainly identify at a glance to anyone, including enforcement officials, those machines for which such payment had been made to Mitchell.

William Oliver also testified that he had discussed the project with other operators of pin ball machines (R 13); that he didn't think anything special about a stranger making a contract for the county (R 13); that his discussion with Mitchell had occurred in Mitchell's office (R 12). This is the only explanation given by Oliver why he 'bought' these 'bonds' and paid money to Mitchell. William Oliver also testified as to how he disposed of the bonds in the following manner: that he 'destroyed them' (R 10): that he 'must have threw them out' (R 11): 'threw them in the

waste paper basket' (R 11); 'probably threw them in the ash can' (R 11). He testified that he had never previously had such 'bonds' in his possession and that the destruction of such 'bonds' was 'an event' which had never happened before or since (R 11).

After the testimony of William Oliver was given, Judge Hartrick consulted his associates Judge Doty and Judge Holland about Oliver's story before convicting him of contempt. (R 14) Judge Hartrick was stricken with illness and was hospitalized almost immediately after the taking of this testimony and did not sign the Judgment and Sentence for contempt for giving false and evasive answers until September 14, 1946, 3 days after petitioner Oliver had been taken in custody. (R 10)

On September 14, 1946 a petition for writ of habeas corpus and ancillary writ of certiorari were filed in the Michigan Supreme Court by petitioner's attorney (R 2). These writs were issued forthwith (R 2). In his Answer Judge Hartrick asserted that petitioner Oliver had given false and evasive answers on material matters and returned all portions of the transcript of Oliver's testimony which were deemed material.

On October 17, 1946 a motion was filed by petitioner for a further return of 'the full testimony' for the reason that petitioner admitted the purchase of the bond referred to in the return and identified a duplicate of the bond submitted to him by Judge Hartrick; and that it would appear from a 'complete return' that petitioner could have no purpose in failing to produce the bond if it were in existence or in falsifying as to the circumstances of its disposal. (R 17) This motion was denied (R 19) by the Michigan Supreme Court and the cause was set for hearing Januarv

7, 1947 (R 20) at which time the cause was submitted on briefs (R 20). No question of 'due process' under the 14th Amendment with reference to the denial of petitioner's motion for 'the full testimony' was raised by petitioner or considered by the Michigan Supreme Court. (R 21-32) On May 16, 1947 the Michigan Supreme Court affirmed the Circuit Court's Judgment and dismissed the writs. (R 20) (R 22-28). An opinion signed by four justices dissented on the ground that it was not 'self-evident' from the record that the answers of petitioner Oliver were 'false and evasive'. (R 28-32)

VI

The Interest of the State Bar of Michigan

The State Bar of Michigan, an organization created in 1935 by the rules of the Supreme Court of the State of Michigan, as authorized by Act 58 of the Public Acts of Michigan for 1935, was granted permission on January 5, 1948, to file a Brief *Amicus Curiae* in the instant case.

The State Bar of Michigan is the Integrated Bar of the State of Michigan, composed of all of the active and practicing lawyers of the State of Michigan, numbering upwards of 6,800 lawyers.

The State Bar of Michigan at its Eleventh Annual Convention in Lansing, Michigan, in September 1946, authorized the appointment of a Special Committee to Study and Report Upon the One-man Grand Jury law in Michigan. A 15-Man Special Committee was thereupon duly appointed for such purpose, which Committee conducted a study of this law and its operation for the entire succeeding year. The majority of this Special Committee (12 members) in its

report recommended inter alia to the Twelfth Annual Convention of the State Bar of Michigan in Grand Rapids, Michigan in September 1947 that:

> "The One-Man Grand Jury Law should, with certain appropriate amendments, remain a part of the system of criminal jurisprudence for the State of Michigan."

This majority report after full debate, was adopted in its entirety.

The minority report (3 members), signed by William H. Gallagher (attorney for petitioner William Oliver), was also submitted, debated, and rejected. Both such reports are published in the September 1947 issue of the Michigan State Bar Journal at page 35, et seq.

In accordance with one of the recommendations in the majority report which was adopted by the State Bar Convention in September 1947 the Special Committee to Study and Report Upon the One-Man Grand Jury Law in Michigan was thereupon reappointed for another year to continue its work, and has been and is now engaged in considering matters in connection with the One-Man Grand Jury Law of Michigan.

The State Bar of Michigan has no direct interest in the outcome of the instant case. It has no reason to favor affirmance if the facts established by the record do not support the conviction of petitioner William Oliver. It likewise has no reason to favor affirmance if petitioner's rights to a review upon a full and complete record have been disregarded.

The State Bar of Michigan, however, does have an interest in correcting grossly misleading statements and infer-

ences presented to the Court which reflect unjustly upon Michigan courts. It does have an interest in challenging such statements and inferences when the Michigan Supreme Court is charged, in effect, with tolerating, if not encouraging, wholesale violations of constitutional rights. It feels a duty to correct misinformation upon which the Court is asked to draw such unfounded inferences.

VII

Origin and development of the one-man grand jury as a part of the criminal jurisprudence of Michigan.

Art. 1, Sec. 11 of the first Constitution adopted by the State of Michigan in 1835 provided that no person should be held for a criminal offense 'unless on the presentment or indictment of a grand jury', except in certain specified instances.

Art. 6, Sec. 28 of the Constitution adopted by Michigan in 1850 omitted that requirement and substituted therefore the 'right to be informed of the nature of the accusation'.

Until 1859 the securing of an indictment against an accused was performed by a 23-man grand jury for every criminal prosecution in Michigan. In that year the Legislature provided that the prosecuting attorney of each county should make his own investigation upon receipt of complaint of crime and should bring the matter before some justice of the peace or other magistrate who should conduct a preliminary examination to determine whether there was probable cause to believe that a crime had been committed and that the accused had committed it. Thereupon a warrant could be issued by such justice or magistrate. After preliminary examination held before the justice or magis-

trate or a waiver thereof, provisions were then made for prosecuting offenders by means of an 'Information filed by the prosecuting attorney.

After 1859 the 23-man grand jury was preserved as an institution of the Court, to be invoked by the circuit judge whenever conditions should warrant its being called. The 23-man grand jury became an extraordinary instrumentality called into use only occasionally and then for the purpose of investigating wide-spread corruption, usually of an official character.

In 1885 a Michigan Statute (Act 161, P. A. 1885), establishing the Detroit police court, gave investigational powers to police magistrates of a similar character to the one-man grand jury. In 1915 a Committee on Law Reform of the Michigan State Bar Association recommended the appointment of a Special Committee on Criminal Law and Procedure. This committee concentrated its efforts on certain specific improvements in criminal procedure, and in 1916 recommended a bill for the institution of proceedings for the discovery of crime, which report was published as a part of the proceedings of the Michigan State Bar Association in 1916.

In 1917 this bill was laid before the Michigan Legislature and was passed (Act 196, P. A. 1917), becoming the present one-man grand jury law, authorizing one Judge to preside over proceedings for the discovery of crime. It was later re-enacted in its entirety as a part of the Michigan Code of Criminal Procedure, chapter 7, sec. 3-6 incl. (Sec. 17217-17220 Mich. Comp. Laws 1929). (See Appendix A of this brief for the entire text of the law.)

The one-man grand jury law is short, concise, simple and direct: briefly it provides that whenever upon filing of com-

plaint, a judge shall have probable cause to suspect that any crime has been committed within his jurisdiction, and that any person may be able to give material evidence respecting such offense, such judge may require such person to attend as a witness and answer such questions as such judge may require concerning any violation of law. Also that the proceedings to summon witnesses and compel them to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process, and upon the return of such process served or executed, the judge shall proceed with the case in like manner as upon formal complaint.

Secrecy is enjoined upon all participating in the inquiry by application of the provisions of law relative to grand juries.

Witnesses who neglect or refuse to appear upon regular summons of the one-man grand jury 'or to answer questions —material to such inquiry' may be punished for contempt —although the sentence for contempt may in judicial discretion be commuted or suspended if the witness appears and answers such questions.

A witness who answers questions which might tend to incriminate him, is granted full immunity from prosecution for any offense concerning which he testifies.

Thirty years experience with the one-man grand jury law has demonstrated that it is a distinct improvement over the older methods for the investigation of crime. It is more flexible and is less unwieldy and cumbersome than a 23-man grand jury. A judge can proceed to hear a witness without waiting for 22 other men to convene, and without publicizing who the witness is, so as to avoid danger or reprisal againts the witness from those against whom such witness may testify. A judge can proceed patiently for a year or more upon some important and far-reaching investigation, recessing from time to time for one day or several weeks, during which time investigators can work, and then convene for an hour or for a half day, and recess again until more testimony is available. Such flexible procedure would be impossible for a 23-man grand jury from scattered homes in different parts of the county.

Also, prompt dispatch of business, immediate decisions, freedom of action and ability to take advantage of sudden 'breaks' or 'tips' characterize the work of the court under one judge to an extent never possible in a group of 23 men.

In addition, the one-man grand jury increases the likelihood that the investigation will be placed in skilled and expert hands. An experienced judge, trained in the criminal laws, familiar with the value and weight of various types of evidence, and with the art of dealing each day with witnesses and criminals is ideally equipped to do efficient, energetic and thorough work in presiding over the investigation of widespread corruption and official misconduct.

It will be noted that the Supreme Court of Michigan has many times during the thirty years during which the one-man grand jury law has been in force, upheld its constitutionality, and always by a unanimous decision. It has

expressly declared that this law serves a wholesome purpose, and that a judge assigned to preside over such an investigation is acting within the powers and obligations placed upon him by the Michigan Constitution.

VIII

The constitutional rights of Michigan citizens have not been "disregarded by the courts of Michigan" in their operation under the one-man grand jury law.

Petitioner's attorneys and the Lawyers Guild have asserted in their briefs and oral argument that constitutional rights of Michigan citizens have been flagrantly disregarded and trampled upon by the Courts of Michigan under the one-man grand jury law. It has been asserted that judges who are otherwise capable, conscientious and hold the confidence of the people of their respective communities, perpetrate all sorts of abuses upon witnesses in one-man grand jury investigations. They intimate that abuses occur in every investigation under the statute and in the case of every witness called to testify.

The State Bar of Michigan does not suggest that there has never been any abuse of the statute at any time. It is altogether likely that some abuses may have occurred at some time in the past 30 years. But petitioner's attorneys and the Lawyers Guild are badly mistaken in their sweeping assertions of wholesale abuses. They are likewise illogical in urging that the one-man grand jury law should be condemned and petitioner Oliver should go unpunished simply because in some other case some other official has transgressed the rules.

Instead of adhering to the record in the instant case, petitioner's attorneys and the Lawyers Guild have gone completely outside the record and have made a host of unsupported statements and have indulged in numerous unwarranted inferences derogatory to the one-man grand jury statute.

The State Bar of Michigan can best answer such sweeping charges by pointing out that twenty-nine Justices of the Michigan Supreme Court have had occasion to express themselves, many of them repeatedly upon matters now under discussion relating to the one-man grand jury law of Michigan. The list includes Justices John E. Bird, Russell C. Ostrander, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Grant Fellows, John W. Stone, Franz C. Kuhn, George M. Clark, Nelson Sharpe, Howard Wiest, John S. McDonald, Ernest A. Snow, Walter H. North, Richard H. Flannigan, Louis H. Fead, William W. Potter, Henry M. Butzel, Thomas A. E. Weadock, George E. Bushnell, Edward M. Sharpe, Harry S. Toy, Bert D. Chandler, Thomas F. McAllister, Emerson R. Boyles, Raymond W. Starr, Neil E. Reid, Leland W. Carr and John R. Dethmers. Not a single one of all these Justices of the Michigan Supreme Court have preceived any such flagrant departures from constitutional principles as are now urged by petitioner's attorneys and the Lawyers Guild.

In this same connection it is interesting to note that included among the 'Michigan Judges' who have presided over a one-man grand jury investigation of crime is Mr. Justice Frank Murphy, of this Court, who was at one time Judge of the Recorder's Court of the city of Detroit, and who made such salutary use of this law that it resulted in a wholesale clean-up of corruption in the city government

of Detroit. The following was said of Judge Murphy's work in June 1925:[*]

> "The budget director of the city of Detroit believed that he had found fraud in the delivery of supplies. Thereupon the county prosecutor petitioned the criminal court to assign one judge to sit as a grand jury and investigate.
>
> "Judge Frank Murphy was assigned to do this work and devoted a number of weeks to it. More than a hundred witnesses were examined and more than 4000

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[*]

See: Vol. 9, No. 1, page 12, Journal of the American Judicature Society (June 1925). The article also states: "The investigation amounted to a thorough inquiry into the subject of graft in various public offices. It was powerful and effective enough to bring to bar officials of a paving concern alleged to have controlled all bids on paving and searching enough to reach down to instances of petty graft. * * * We believe it is safe to assert that no community in this country has ever had such a penetrating and thorough survey of irregularities in office. * * * We believe also that it is conservative to assert that the procedure afforded by the 'one man grand jury' law is the best that has been devised and should be brought to the attention of many persons who are now clamoring for law enforcement. This procedure appears to possess every advantage that can be claimed for the time-honored grand jury procedure and to be superior in a variety of ways. It centers responsibility in a conspicuous judicial officer who has adequate powers to get to the bottom of the most involved mess of rumors and charges. In the Detroit instance the judge was chosen especially for this assignment from the criminal court of that city. There was no dependence upon a large jury of untrained citizens called upon to neglect their private affairs for a period of many weeks. Every safeguard of judicial procedure surrounded the investigation. At its conclusion the judge had ample time to study the mass of testimony. Of course the hearings were ex parte, as they always must be prior to the issuing of warrants. This procedure insures even better than the accustomed grand jury procedure that witnesses will be protected by privacy and that secrecy will be maintained until the time shall have arrived for publicity."

pages of testimony taken. The State was represented by the county prosecutor, the corporation counsel and a special assistant to the latter. The taking of testimony was closed March 17 and a month later Judge Murphy wrote a letter to the prosecutor directing the prosecution of nineteen persons and exonerating others. The accused were officials of the city and county and contractors, and one was vice-president of a trust company. The charges were various: conspiracy, embezzlement, extortion and malfeasance in office."

Likewise it is conservatively estimated that ten thousand persons have appeared as witnesses under the one-man grand jury procedure in the past 30 years. Not all, but many of these witnesses were persons who had guilty knowledge about the conduct of themselves and others which they did not wish to disclose, and who would try to tell plausible stories which did not coincide with the truth. Accepting the statement of the Lawyers Guild, for the sake of the argument, that a considerable number of witnesses have been punished for contempt, they still constitute such a small percentage of the total as to refute the charge that judges have indulged in a practice of using their power as a method of terrorizing witnesses. If a witness falsifies or evades true answers about material matters, and the evidence is self-evident upon the transcript, he most certainly should be punished for contempt. That so few have been punished by comparison with the total number of witnesses who testified, does not prove that the average of truth-telling in Michigan has been higher than the average of witnesses generally, but rather that Michigan Judges have been acting with a great deal of restraint.

The loose charge that 'the Michigan statute has been viewed and applied in large measure as an autochthonous

grant to elected judges of extraordinary powers to act simultaneously as detectives, magistrates, and 23-man grand juries', (Brief of Lawyer's Guild, p. 11) is not in the slightest degree supported by the facts. Before there can be a trial there must be an accusation and in Michigan this may come about in any one of the following three ways:

A. An indictment voted by a 23-man grand jury.

B. A complaint against a specific person charging a specific offense before a *justice of the peace or other magistrate*, and a warrant issued by the justice or magistrate in the usual way.

C. A complaint *before a one-man grand jury* that a crime has been committed, but not naming any specific person, followed by an investigation and a warrant issued by the one-man grand jury under the Statute.

Thus the one-man grand jury is merely a logical and reasonable extension of ordinary criminal investigative procedure. Under the usual procedure of the general statute, Mich. Code of Criminal Procedure, chap. 6, § 2, Mich. Comp. Laws 1929, § 17194, Mich. Stat. Ann. § 28.920, witnesses may be produced before the magistrate to support the complaint against an accused before a warrant is issued. The one-man grand jury statute merely adds provision for secrecy, exactly as if witnesses were called before the common-law type of grand jury. The one-man grand jury statute merely simplifies and combines ordinary features of the usual methods.

The respondent is entitled to an examination before being bound over for trial. In case of the one-man grand jury, the law of Michigan was amended in 1947 to provide that

some magistrate other than the judge who acted as the one-man grand jury, shall conduct the examination. Hence the accused is entitled to a complete examination before being bound over for trial before some judge other than the judge who presided over the one-man grand jury, and thereafter the accused is entitled to a trial before a jury, presided over by a different judge.

Many of the same claims made by petitioner's attorneys and the Lawyers Guild were sifted by the Special Committee of the State Bar of Michigan in 1947 with the result contained in its report. It is interesting to note that the chief documentation for many of those statements and inferences is the minority report of the State Bar Committee signed by one of petitioner's attorneys, a magazine article written by one of petitioner's attorneys, and various newspaper interviews. It is chiefly upon this basis that petitioner's attorneys and the Lawyers Guild are attempting to create an atmosphere of illegality, without anything in the record of the instant case or any other reported case to support it.

The State Bar of Michigan believes the petition of William Oliver for Certiorari in the United States Supreme Court should stand or fall upon its own record; that the instant case should not be used as a vehicle for defaming or destroying confidence in the one-man grand jury law of Michigan; and that the sole aim in the instant case should be to ascertain whether anything calls for correction in the case of William Oliver, permitting the people of the State of Michigan to determine through their Legislature whether the one-man grand jury law should remain as a part of the criminal jurisprudence of Michigan.

IX

Michigan judges acting as one-man grand jurors do not "without restraint" engage in a practice of "summarily convicting citizens of contempt of court, even though they have never been before a court", and it was not done in the instant case.

It was asserted in the 'Reasons for Allowance of Writ' (R 5) that 'scores of Michigan citizens have been summarily convicted of contempt of Court, even though they have never been before a Court, by Judges acting as one-man grand jurors'. It is also asserted that 'the Judges do this without restraint'. (R 5)

This charge is untrue. The only excuse for such a statement is the possible claim that it is made in a 'legalistic' sense or is based upon petitioner's claim that the grand jury law as construed by the Michigan Supreme Court is unconstitutional.

Petitioner's claim has no foundation in the record in the instant case nor in the record of any other Michigan case. On the contrary, the Michigan Supreme Court has repeatedly held that a Circuit Judge, conducting a one-man grand jury proceeding under sections 17217-17220 Michigan Compiled Laws for 1929, is acting in a judicial capacity, and that the Circuit Judge conducting the one-man grand jury

proceeding has all of the power of the Circuit Court summarily to sentence a witness for contempt of court.

Mundy v. *McDonald*, (1921), 216 Mich. 444.

People v. *Doe*, (1924), 226 Mich. 5.

People v. *Wolfson*, (1933), 264 Mich. 409.

In re Slattery, (1945), 310 Mich. 458—(cert. denied 325 U.S. 876).

In this connection we would point out that a Circuit Judge, conducting a grand jury proceeding under this statute (sections 17217-17220 Mich. Compiled Laws for 1929), holds Court, summons witnesses, presides over the swearing and interrogating of witnesses, grants orders of immunity, maintains and signs the daily journal of the court, is expected to maintain the dignity of the court, and in every other way to conduct the functions of the Circuit Court.

Federal Courts are bound by the construction placed upon the statute of a State by its highest Court. This applies to the construction placed upon the one-man grand jury statute of the Michigan Supreme Court.

Slattery v. *MacDonald* (1945), 151 Fed. (2d) 326;
Cert. den. 326 U.S. 787;
rehearing den. 327 U.S. 814.

Section 5 of Chapter 7 of the Michigan Code of Criminal Procedure (Sec. 17219 Mich. Comp. Laws 1929) provides:

"• • any witness neglecting or refusing to answer any questions which such judge may require • • shall be deemed guilty of contempt."

The Michigan Supreme Court has construed the language of this statute and has held it to be an obstruction of justice punishable summarily as a direct contempt in the face of the court for a grand jury witness to refuse to tell what he knows, whether the refusal is absolute or by the substitute of evasive answers.

In re Slattery (1945), 310 Mich. 458;
Cert. den. 325 U.S. 876.

The Michigan Supreme Court has construed the language of the statute (Sec. 13910, 13911 Comp Laws. of Mich. for 1929) and has held that the Circuit Judge 'while acting as a one-man grand jury, may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith', and that the witness' contempt was committed in the face of the Court and required no extraneous proofs as to its occurrence. It was direct and there was no necessity to file charges, serve notice upon the accused and conduct a hearing.

In re Hartley (1947), 317 Mich. 441.

In the petition for the writ in the instant case, petitioner Oliver said (R 5):

"I testified in secret chambers and not in Court."

Here again we find a statement which is not true. The only excuse for such a statement is that it is used merely in a 'legalistic' sense. The truth is that petitioner Oliver testified *on the witness stand in the courtroom in the Court House before the Circuit Judge under examination by a Special Assistant Attorney General.* Petitioner cannot change the facts by using the nomenclature 'secret chambers.' The fact that it was "secret" is nothing unusual. All grand jury inquiries are conducted secretly. Nor can

the use of the word "chambers" change the fact that petitioner Oliver testified from the witness stand in the courtroom in the Court House, the regular place for holding Court, when the testimony was taken by the Circuit Court. It may be added that Circuit Court George B. Hartwick who was presiding over the One-Man Grand Jury, had previously called in Circuit Judge Frank L. Doty and Circuit Judge H. Russel Holland to sit with him throughout the proceeding in an advisory capacity. (R 8, 14)

Likewise there is nothing in the record to show that this grand jury proceeding was conducted in a "hide-out"; nor that it was held "in the middle of the night"; nor that William Oliver was subjected to torture, mental or otherwise; nor that William Oliver was ever intimidated by the Court or any of its officers. On the contrary the record clearly indicates that if William Oliver was in any terror, his apprehension of danger could well have come from fear of those whom his testimony might have involved, and that certain outside influences might have led him to give evasive testimony. As a matter of fact, if witnesses in other cases had been subjected to treatment of the kind indicated in the brief of the Lawyers Guild, by being coerced, put in fear, tortured or otherwise ill-treated, surely some of the numerous cases appealed to the Michigan Supreme Court (some of which have gone to the Supreme Court of the United States) would have disclosed the situation. Always such conduct, as in the instant case, is charged with respect to some "other case".

In any event there is no legal or factual foundation in the instant record for the assertion that petitioner William Oliver "was sentenced for contempt without being before a Court" and that "scores of Michigan citizens" have been similarly convicted "without even being before a Court."

X

The question of whether the return of a portion of the Circuit Court's transcript was a denial of "due process" under the 14th amendment was never presented to the Michigan Supreme Court; it was not properly raised and this Court lacks jurisdiction to hear and determine the same.

The question of whether petitioner Oliver was deprived of "due process" under the 14th Amendment on this ground (incomplete return) is raised in this Court for the first time and is therefore not properly before this Court. It was never raised nor presented to the Michigan Supreme Court at any time.

The order denying petitioner's motion for additional testimony was entered December 3, 1946. (R 19) and the cause was submitted on briefs January 7, 1947. (R 20) There is not the slightest intimation in the record or in the opinions of the Michigan Supreme Court that the question was ever raised before the Michigan Court that William Oliver was deprived of his liberty without "due process of law" in violation of the guarantee of the 14th Amendment on this ground (incomplete return). (R 22-32)

While it is true that the Michigan Supreme Court had entered judgment, petitioner, in applying to this Court for a Writ of Certiorari, alleged (R 5) as one of his "reasons for Allowance of Writ" that the Court below "has established the practice, as in the instant case, of permitting the grand juror to return only so much of the witness' testi-

mony as he sees fit to return", petitioner's attorneys still did not raise such question about "due process" under the 14th Amendment in his "Questions Presented" (R 4). Nor did petitioner's attorneys discuss the question at all in their original brief in this Court (B 8-12). Nor did petitioner's attorneys present the question of adequacy of remedy in their Reply Brief filed December 15, 1947, one day before the cause was argued orally in this Court. Nor was the question discussed in its Federal aspects in the brief filed by the Lawyers Guild. The Federal question was not raised until, encouraged by a question from the Bench, one of petitioner's attorneys contended orally that William Oliver had been denied due process under the 14th Amendment because the review by the Court below was upon a "partial record".

Rule 38 (2) of the Rules of the Supreme Court of the United States provides in part as follows:

> " * * Only the questions specifically brought forward by the petition for the writ of certiorari will be considered * * ."

The petition for certiorari set forth each point to be reviewed.

Clark v. *Willard* (1935), 294 U.S. 211; 79 L. Ed. 865

It has also been held that assignments of error cannot import into review any questions not raised below.

Missouri Pacific Railway v. *Fitzgerald* (1896) 160 U.S. 556; 40 Law Ed. 536

A point of error cannot be first raised in the petition for certiorari.

Helvering v. *Minnesota Tea Co.* (1935)
296 U.S. 378; 80 Law Ed. 284

Flournoy v. *Wiener* (1943)
321 U.S. 253; 88 L. Ed. 708; 64 S. Ct. 548

The question comes too late and should not, under the rules and opinions of this Court, receive any consideration.

XI

Assuming that the question of denial of "due process" under the 14th Amendment because of partial record had been properly raised, still petitioner was not deprived of any constitutional right of review.

One of petitioner's attorneys in the oral argument of the instant case on December 16, 1947, raised the question of whether petitioner had been denied 'due process' under the 14th Amendment. This charge is based upon the fact that the Michigan Supreme Court denied William Oliver's motion (R 17) for an order requiring the Circuit Judge to return 'the full testimony given by petitioner before said judge for the reason that said testimony will disclose that deponent freely and promptly admitted the purchase of the bond referred to in respondent's return and identified a duplicate of said bond submitted to him by said respondent * * *'.

In considering the return of the transcript of testimony by the one-man grand jury several important considerations must be kept in mind. The interest of the witness is, of course, important. So is the public interest in discovering

crime and defending itself against criminals. The interest of neither should be considered independent of the other.

It must be apparent to this Court that the purpose of the Grand Jury proceedings is to obtain the truth regarding widespread violations of the criminal law. Such an investigation is usually launched upon a large scale and in many cases relates to conspiracies which include unfaithful public officers. It is important that the legislative mandate of secrecy be maintained. To publish the entire transcript of the witness' testimony, without regard to the scope of the review or the materiality of the testimony to the points upon review, would, in most cases, reveal lines of inquiry which would give aid and comfort to every enemy of the law, including influential persons in high places who are suspected of crime. As a matter of fact it might even become profitable to "bait" the Court by deliberately planning an appeal on behalf of a minor witness in order to obtain a full transcript which would reveal to other interterested persons all direct as well as collateral lines of inquiry. Hence it would be highly improper arbitrarily to require in every case that every part of the transcript, including non-material portions, be returned regardless of materiality to the issues upon which the witness is convicted. While the Court should endeaver to avoid publishing names and particulars where that can be done without interfering with the review on a full record of the material proceedings, it should require the production of a full transcript of all material matters whenever necessary to the principal purpose of affording a fair and honest determination of the issues upon review. If the witness contends that the Court has omitted any material portion, he has a right to point out as definitely as possible what portions he contends have been omitted.

By Rule 72, § 1, par. (d), the Michigan Supreme Court has asserted that it has the power and duty to decide whether the record should be supplemented:

> "Section 1. The Supreme Court may, at any time, in addition to its general powers, in its discretion and on such terms as it deems just: . . . (d). Permit the transcript or record to be amended by correcting errors or adding matters which should have been included; . . ."

The State Bar of Michigan believes that in every case a witness convicted of contempt should have the right to have the Michigan Supreme Court determine to what extent the one-man grand jury's return should be supplemented by additional portions of the transcript in order to decide whether the witness has been properly convicted of contempt.

If the Michigan Supreme Court refuses to grant a witness convicted of contempt the right to supplement the record by additional portions of the transcript, and the witness still believes such additional portions are material and should have been returned, we believe *it becomes the duty of such witness to raise any question of denial of due process under the Fourteenth Amendment before the Michigan Supreme Court. If he does not do so he should not be allowed to raise the question before the Supreme Court of the United States.*

In the instant case it is significant that petitioner's affidavit and motion for a "return of the full testimony" (R 17, 18) were limited to the point that such testimony would show that the witness "freely and promptly admitted the purchase of the bond and identified a duplicate of the bond" (purchased by him from C. A. Mitchell). Grant-

ing everything that petitioner claimed, to the effect that a return of the full testimony would have shown that the witness admitted the purchase of the bond and identified a duplicate of the bond, there was no prejudice nor error in the slightest degree because the fact of the purchase of the bond as well as the identity of the form of the bond was not in question. Petitioner's contempt, upon which the Michigan Supreme Court affirmed his conviction, is not based upon any such points, as will be readily seen from a reading of the Court's Opinion (R 26-27). The Michigan Supreme Court accepted and recognized the fact that the witness admitted the purchase of the bonds as well as the *form* of the bond, but held that it was self-evident that petitioner's answers were false and evasive with reference to his *purpose in paying* the money to C. A. Michell for the bonds and also with reference to his *conflicting claims* as to how he *disposed of such bonds.* It would have been an idle ceremony to have granted petitioner's motion under such circumstances. Petitioner was not harmed in the least by the formal denial of his motion and it certainly cannot be said on this record that the remedy of review by the Court below was so inadequate as to deny "due process".

XII

Even if the return upon conviction for contempt omitted material portions of the transcript, this alone would not constitute a denial of "due process" under the 14th Amendment.

Petitioner's attorneys belatedly now assert that the omission upon conviction for contempt of material portions of the transcript, would in itself constitute a denial of "due process" under the 14th Amendment.

In the case of *Eilenbecker* v. *Dist. Court of Plymouth County, Iowa* (1889), 134 U.S. 31; 33 Law Ed. 801, it was held that the summary power to sentence for contempt pre-existed the 14th Amendment providing for "due process" and that the 14th Amendment does not affect this power. In that case petitioner was punished for contempt by the District Court for selling liquor contrary to court order. He sought to have his conviction set aside because it 'deprived him of the right to trial by jury under the 14th Amendment'. The issue was thus squarely presented to this Court whether the 14th Amendment affected the inherent power of a State Court to punish for contempt of its mandates. This Court held that the 14th Amendment had no such effect. The Court said:

> " * * It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it shall have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."

The *Eilenbecker* case, supra, was cited with approval in *Camorata* v. *United States*, C.C.A. (3rd) 1940, 111 Fed. (2d) 243, Cert. den. 311 U.S. 651.

It would seem that inasmuch as this Court has held that the 14th Amendment does not affect the inherent power of a state court to punish for contempt, the question is foreclosed in the instant case,—even if the question had been timely raised.

XIII

Petitioner was not sentenced for contempt upon the mere basis of giving "unsatisfactory answers"; the Michigan Supreme Court had scrupulously adhered to the constitutional rule.

It has been asserted by petitioner's attorneys that petitioner was sentenced for contempt "when his answers did not satisfy his questioners". In addition it has been asserted by petitioner's attorneys and the Lawyers Guild that petitioner was convicted because the judge on his own opinion or suspicion decided that petitioner was untruthful, or because the judge had greater confidence in the veracity of other witnesses.

There is no foundation for such a charge. Nor was any such reason the basis for the Michigan Supreme Court affirming William Oliver's conviction. On the contrary the Michigan Supreme Court pointed out (R 22-28) with particularity the falsity and evasiveness of petitioner's testimony which, it said was self-evident from the transcript.

The Michigan Supreme Court has held that there must be either:

(a) an express admission of falsity, or answer so conflicting, inconsistent and contradictory that there is no other reasonable explanation except willful falsehood; or

(b) a claim of failure to recall or know about matters which the witness could not possibly fail to know or remember.

In all other cases the Michigan Supreme Court has held that a trial by jury after due notice is required.

Nothing could be more threadbare and repudiated than the claim that Michigan Courts allow a grand jury witness to be summarily sentenced when his answers "do not satisfy the judge".

In re Slattery (1945), 310 Mich. 458; Cert. den. 325 U.S. 876.

Whether there is sufficient in the record in a particular case for the reviewing court to say that falsity or evasiveness is self-evident is entirely different and apart from the question of whether there is in effect in Michigan a rule of law that requires such a showing as a condition precedent to any conviction for contempt. It has been pointed out in the instant case that the Michigan Supreme Court was equally divided in the two opinions handed down. But it will be observed that the Michigan Supreme Court was unanimous in announcing the constitutional rule.

Inasmuch as the Michigan Supreme Court has clearly announced the well-defined rule it ill becomes anyone to charge that Michigan Courts summarily sentence grand jury witnesses for merely giving "unsatisfactory answers". The record in the instant case proves that both opinions of the Michigan Supreme Court enunciated the same rule and continue to observe it. There may be disagreement upon whether the petitioner's answers, *as a matter of fact,* were false and evasive to a point where it is "*self-evident*" upon the record; but this is scant reason to indulge in a charge that in the instant case or in any other reported case the Michigan Supreme Court has followed an unconstitutional practice.

The State Bar of Michigan does not presume to favor affirmance if *the facts* in the instant case do not amount to "falsity and evasion which is self-evident upon the record."

We do not believe that the Supreme Court of the United States has any jurisdiction to reverse the instant case on the ground that it may differ from the Michigan Supreme Court on a decision of the facts, if the Michigan Supreme Court has applied the proper constitutional principles in arriving at its decision on the facts.

XIV

Conclusion

The State Bar of Michigan is interested in every procedure which safeguards the rights of individual citizens. It is also interested in seeing that the public shall be neither powerless nor unarmed in the ceaseless effort necessary to combat crime.

We submit that the numerous claims by petitioner's attorneys regarding procedure under the one-man grand jury law of Michigan, should be disregarded, and that consideration of this case shall be confined solely to those issues which are properly raised in this Court, and should be confined to the record in the instant case.

Respectfully Submitted,

State Bar of Michigan
Harry G. Gault, President

Wilber M. Brucker, Chairman,
Special Chairman, Committee
on One-man Grand Jury.

412 Olds Tower
Lansing, Michigan

Jan. 14, 1948.

APPENDIX A

The Michigan "One-Man Grand Jury" Statute

Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings. (C. L. 1929, § 17217; Mich. Stats. Ann. § 28943).

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there

is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors (C. L. 1929 § 17218; Mich. Stats. Ann. § 28.944).

Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: *Provided*, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence. (C. L. 1929, § 17219; Mich. Stats. Ann. § 28.945).

No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him (C. L. 1929, § 17220; Mich. Stats. Ann. § 28.946).

SUPREME COURT OF THE UNITED STATES

No. 215.—October Term, 1947.

In re William Oliver, Petitioner. } On Writ of Certiorari to the Supreme Court of Michigan.

[March 8, 1948.]

Mr. Justice Black delivered the opinion of the Court.

A Michigan circuit judge summarily sent the petitioner to jail for contempt of court. We must determine whether he was denied the procedural due process guaranteed by the Fourteenth Amendment.

In obedience to a subpoena the petitioner appeared as a witness before a Michigan circuit judge who was then conducting, in accordance with Michigan law, a "one-man grand jury" investigation into alleged gambling and official corruption. The investigation presumably took place in the judge's chambers, though that is not certain. Two other circuit judges were present in an advisory capacity.[1] A prosecutor may have been present. A stenographer was most likely there. The record does not show what other members, if any, of the judge's investigatorial staff participated in the proceedings. It is certain, however, that the public was excluded—the questioning was secret in accordance with the traditional grand jury method.

After petitioner had given certain testimony, the judge-grand jury, still in secret session, told petitioner that neither he nor his advisors believed petitioner's story—that it did not "jell." This belief of the judge-grand jury was not based entirely on what the petitioner had testified. As will later be seen, it rested in part on beliefs or suspicions of the judge-jury derived from the testimony of at least one other witness who had previously given

[1] Under certain circumstances Michigan law permits circuit judges to sit with other circuit judges in an advisory capacity. Mich. Stat. Ann. § 27.188 (Henderson 1938); Mich. Comp. Laws 1929 § 13666.

evidence in secret. Petitioner had not been present when that witness testified and so far as appears was not even aware that he had testified. Based on its beliefs thus formed—that petitioner's story did not "jell"—the judge-grand jury immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail. Under these circumstances of haste and secrecy, petitioner, of course, had no chance to enjoy the benefits of counsel, no chance to prepare his defense, and no opportunity either to cross examine the other grand jury witness or to summon witnesses to refute the charge against him.

Three days later a lawyer filed on petitioner's behalf in the Michigan Supreme Court the petition for habeas corpus now under consideration. It alleged among other things that the petitioner's attorney had not been allowed to confer with him and that, to the best of the attorney's knowledge, the petitioner was not held in jail under any judgment, decree or execution, and was "not confined by virtue of any legal commitment directed to the sheriff as required by law." An order was then entered signed by the circuit judge that he had while "sitting as a One-Man Grand Jury" convicted the petitioner of contempt of court because petitioner had testified "evasively" and had given "contradictory answers" to questions. The order directed that petitioner "be confined in the county jail . . . for a period of sixty days . . . or until such time as he . . . shall appear and answer the questions heretofore propounded to him by this Court . . . ."

The Supreme Court of Michigan, on grounds detailed in the companion case of *In re Hartley*, 317 Mich. 441, 27 N. W. 2d 48,[2] rejected petitioner's contention that the

[2] In giving reasons in its *Hartley* opinion for rejecting this petitioner's constitutional contentions, the State Supreme Court said it would have been an "idle gesture to require such adjournment of the grand jury and its reconvening as a circuit court. The circuit

summary manner in which he had been sentenced to jail in the secrecy of the grand jury chamber had deprived him of his liberty without affording him the kind of notice, opportunity to defend himself, and trial which the due process clause of the Fourteenth Amendment requires.[3] *In re Oliver*, 318 Mich. 7, 27 N. W. 2d 323. We granted certiorari to consider these procedural due process questions.

The case requires a brief explanation of Michigan's unique one-man grand jury system.[4] That state's first constitution (1835), like the Fifth Amendment to the Federal Constitution, required that most criminal prosecutions be begun by presentment or indictment of a grand

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judge, while acting as a one-man grand jury may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith.

"Plaintiff's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided in 3 Comp. Laws of 1929, *13912 (Stat. Ann. *27.513). It was properly dealt with summarily. 3 Comp. Laws 1929, **13910–11 (Stat. Ann. **27.511–27.512)." 317 Mich. at 444–445, 27 N. W. 2d at 50.

[3] By a four to four vote the court also held that there was "evidence to support the finding" of the judge-grand jury that petitioner had testified falsely. Petitioner has argued here that there was not a shred of evidence which under any circumstances could have conceivably supported this finding and thus that he was deprived of his liberty without due process of law. In the view that we take of this case we find it unnecessary to consider this constitutional contention.

[4] The laws authorizing the system are found in Michigan Comp. Laws 1929, § 17217, *et seq.*; Mich. Stat. Ann. §§ 28.943 *et seq.* (Henderson 1938). A summary of the ten states' statutes which have some similarities to Michigan's appears in Winters, *The Michigan One-Man Grand Jury*, 28 J. Am. Jud. Soc. 137. See, *e. g.*, Conn. Gen. Stat. § 889f (Supp. 1941); *McCarthy* v. *Clancey*, 110 Conn. 482, 148 A. 551; Okla. Stat. Ann. tit. 37, § 83; tit. 21 § 951 (1937); *Ex parte Ballew*, 20 Okla. Cr. 105, 201 P. 525.

jury. Art. I, § 11. This compulsory provision was left out of the 1850 constitution and from the present constitution (1908). However, Michigan judges may still in their discretion summon grand juries, but we are told by the attorney general that this discretion is rarely exercised and that the "One-Man Grand Jury" has taken the place of the old Michigan 16 to 23-member grand jury, particularly in probes of alleged misconduct of public officials.

The one-man grand jury law was passed in 1917 following a recommendation of the State Bar Association that, in the interest of more rigorous law enforcement, greater emphasis should be put upon the "investigative procedure" for "probing" and for "detecting" crime.[5] With this need uppermost in its thinking the Bar Association recommended a bill which provided that justices of the peace be vested with the inquisitorial powers traditionally conferred only on coroners and grand juries. The bill as passed imposed the recommended investigatory powers not only on justices of the peace, but on police judges and judges of courts of record as well. Mich. Laws 1917, Act 196.

Whenever this judge-grand jury may summon a witness to appear, it is his duty to go and to answer all material questions that do not incriminate him. Should he fail to appear, fail to answer material questions, or should the judge-grand jury believe his evidence false and evasive, or deliberately contradictory, he may be found guilty of contempt. This offense may be punishable by a fine of not more than one hundred dollars, or imprisonment in the county jail not exceeding sixty days, or both, at the discretion of the judge-grand jury. If after having been so sentenced he appears and satisfactorily

[5] Proceedings of the Twenty-sixth Annual Meeting of the Michigan State Bar Association 101–105 (1916).

answers the questions propounded by the judge-jury, his sentence may, within the judge-jury's discretion, be commuted or suspended. At the end of his first sentence he can be resummoned and subjected to the same inquiries. Should the judge-jury again believe his answers false and evasive, or contradictory, he can be sentenced to serve sixty days more unless he reappears before the judge-jury during the second 60-day period and satisfactorily answers the questions, and the judge-jury within its discretion then decides to commute or suspend his sentence.[6]

In carrying out this authority a judge-grand jury is authorized to appoint its own prosecutors, detectives and aides at public expense,[7] all or any of whom may, at the discretion of the justice of the peace or judge, be admitted to the inquiry. Mich. Stat. Ann. § 28.944 (Henderson 1938). A witness may be asked questions on all subjects and need not be advised of his privilege against self-incrimination, even though the questioning is in secret.[8] And these secret interrogations can be carried on day or night, in a public place or a "hideout," a courthouse, an office building, a hotel room, a home, or a place of business; so well is this ambulatory power understood in Michigan that the one-man grand jury is also popularly referred to as the "portable grand jury."[9]

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[6] *In re Ward*, 295 Mich. 742, 747, 295 N. W. 483, 485. (First 60-day conviction May 31, 1940, followed by second 60-day conviction July 29, 1940. A $100 fine was also imposed in each instance.)

[7] *In re Investigation of Recount*, 270 Mich. 328, 331, 258 N. W. 776, 777; *In re Slattery*, 310 Mich. 458, 479, 17 N. W. 2d 251, 259.

[8] *People* v. *Wolfson*, 264 Mich. 409, 413, 250 N. W. 260, 262; *In re Watson*, 293 Mich. 263, 269, 291 N. W. 652, 655; *People* v. *Butler*, 221 Mich. 626, 631–632, 192 N. W. 683, 687.

[9] Winters, *The Michigan One-Man Grand Jury*, 28 J. Am. Jud. Soc. 137, 143; *Unprecedented Success in Criminal Courts*, 26 J. Am. Jud. Soc. 42–43.

It was a circuit court judge-grand jury before which petitioner testified. That judge-jury filed in the State Supreme Court an answer to this petition for habeas corpus. The answer contained fragments of what was apparently a stenographic transcript of petitioner's testimony given before the grand jury. It was these fragments of testimony, so the answer stated, that the "Grand Jury" had concluded to be "false and evasive." The petitioner then filed a verified motion with the State Supreme Court seeking to have the complete transcript of his testimony before the judge-jury produced for the habeas corpus hearing. He alleged that a full report of his testimony would disclose that he had freely, promptly, and to the best of his ability, answered all questions asked, and that the full transcript would refute the charge that he had testified evasively or falsely. In his answer to the motion the circuit judge did not deny these allegations. However, he asserted that the fragments contained in the original answer showed "all of the Grand Jury testimony necessary to the present proceeding" and that "the full disclosure of petitioner's testimony would seriously retard Grand Jury activities." The State Supreme Court then denied the petitioner's motion. Thus when that Court later dismissed the petition for habeas corpus it had seen only a copy of a portion of the record of the testimony given by the petitioner.

The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge, and therefore we do not concern ourselves with that question. It has long been recognized in this country however that the traditional 12 to 23-member grand juries may examine witnesses in secret sessions. Oaths of secrecy are ordinarily taken both by the members of such grand juries and by witnesses before them. Many reasons have been advanced to support grand jury secrecy. See, *e. g.*, *Hale* v. *Henkel*, 201 U. S. 43, 58–66; *State* v. *Brauch*, 68

N. C. 186. But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a "no-bill" or an indictment. They do not try and they do not convict. They render no judgment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all.[10] Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one-man grand jury may be, as Michigan holds, judicial in their nature,[11] the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.

Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, but by

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[10] See cases collected in 8 A. L. R. 1579–1580; Orfield, Criminal Procedure from Arrest to Appeal 161 (1947).

[11] *In re Slattery*, 310 Mich. 458, 466–468, 17 N. W. 2d 251, 254–255; *Kloka* v. *State Treasurer*, 318 Mich. 87, 90, 27 N. W. 2d 507, 508; *cf. Todd* v. *United States*, 158 U. S. 278, 284; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 481, 489; *United States* v. *Ferreira*, 13 How. 40, 44–48.

the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both. Thus our first question is this: Can an accused be tried and convicted for contempt of court in grand jury secrecy?

First. Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal,[12] state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. Summary trials for alleged misconduct called contempt of court [13] have not been regarded as an exception to this universal rule against secret trials, unless some other Michigan one-man grand jury case may represent such an exception.

This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.[14] In this country the guarantee to an accused of

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[12] Cases within the jurisdiction of courts martial may be regarded as an exception. *Ex parte Quirin*, 317 U. S. 1, 43; *King* v. *Governor of Lewes Prison*, 61 Sol. J. 294, 30 Harv. L. Rev. 771. Whatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public. But it has never been the practice wholly to exclude parents, relatives, and friends, or to refuse juveniles the benefit of counsel.

[13] Under Michigan law contempt proceedings against a witness before a one-man grand jury are criminal in nature. *In re Wilkowski*, 270 Mich. 687, 259 N. W. 658. But this characterization is not material in resolving this due process question. *Cf. Gompers* v. *United States*, 233 U. S. 604, 610–611.

[14] Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381–384. Early commentators mention that public trials were commonly held without attempting to trace their origin. Sir Thomas Smith in 1565

the right to a public trial first appeared in a state constitution in 1776.[15] Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions.[16] Today almost without exception[17] every state by consti-

in his De Republica Anglorum bk. 2, pp. 79, 101 (Alston ed. 1906); Sir Matthew Hale about 1670 in his History of The Common Law of England 343–345 (Runnington ed. 1820). In 1649, a few years after the Long Parliament abolished the Court of Star Chamber, an accused charged with high treason before a Special Commission of Oyer and Terminer claimed the right to public trial and apparently was given such a trial. Trial of John Lilburne, 4 How. St. Tr. 1270, 1274. "By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted." 2 Bishop, New Criminal Procedure § 957 (2d ed. 1913).

[15] Penn. Const., Declaration of Rights IX (1776); N. C. Const. Declaration of Rights IX (1776) (criminal convictions only by jury verdict in "open court").

[16] See, *e. g.*, Vt. Const., ch. I, art. 11 (1787); Dela. Const. § 7 (1792); Ky. Const. Art. XII, cl. 10 (1792); Tenn. Const. Art. IX, § 9 (1796); Miss. Const. Art. I, § 10 (1817); Mich. Const. Art. I, § 10 (1835); Tex. Const. Art. I, § 8 (1845).

[17] Four states, Massachusetts, New Hampshire, Virginia and Wyoming, appear to have neither statutory nor constitutional provisions specifically requiring that criminal trials be held in public, although all have constitutions guaranteeing an accused the right to a jury trial. Mass. Const. Pt. I, Art. XII; N. H. Const. Pt. I, Arts. XV, XVI; Va. Const. Art. I, § 8; Wyo. Const. Art. I, § 10. Massachusetts by implication has recognized that an accused has a right to a public trial as well. A statute of that state permits the exclusion of spectators in only a limited category of cases. Mass. Gen. Laws c. 278, § 16A (1932). In New Hampshire and Wyoming no statute or decision has been found in which the right of an accused to a public trial is mentioned. In Virginia, although no decision has been discovered, a statute provides: "In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may in its discretion, exclude from the trial any or all persons whose presence is not deemed necessary." Va. Code Ann. § 4906 (1942).

tution,[18] statute,[19] or judicial decision,[20] requires that all criminal trials be open to the public.

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition,[21] to the excesses of

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[18] Forty-one states: Ala. Const. § 6; Ariz. Const., Art. II, § 24; Ark. Const., Art. II, § 10; Cal. Const., Art. I, § 13; Colo. Const., Art. II, § 16; Conn. Const., Art. I, § 9; Dela. Const., Art. I, § 7; Fla. Const., Declaration of Rights, § 11; Ga. Const., Art. I, § 2–105; Idaho Const., Art. I, § 13; Ill. Const., Art. 2, § 9; Ind. Const., Art. I, § 13; Iowa Const., Art. I, § 10; Kan. Const., Bill of Rights, § 10; Ky. Const., § 11; La. Const., Art. I, § 9; Me. Const., Art. I, § 6; Mich. Const., Art. 2, § 19; Minn. Const., Art. I, § 6; Miss. Const., § 26; Mo. Const., Art. 2, § 22; Mont. Const., Art. 3, § 16; Neb. Const., Art. I, § 11; N. J. Const., Art. I, § 8; N. M. Const., Art. II, § 14; N. C. Const., Art. I, § 13 (no convictions for crime except by jury verdict in "open court"); N. D. Const., Art. I, § 13; Ohio Const., Art. I, § 10; Okla. Const., Art. 2, § 20; Ore. Const., Art. I, § 11; Pa. Const., Art. I, § 9; R. I. Const., Art. I, § 10; S. C. Const., Art. I, § 18; S. D. Const., Art. 6, § 7; Tenn. Const., Art. I, § 9; Tex. Const., Art. I, § 10; Utah Const., Art. I, § 12; Vt. Const., ch. I, Art. 10; Wash. Const., Art. I, § 22; W. Va. Const., Art. III, § 14; Wis. Const., Art. I, § 7.

[19] Two states: Nev. Comp. Laws Ann. § 10654 (1929); N. Y. Civil Rights Law § 12.

[20] The Maryland Court of Appeals has apparently interpreted the state constitution as prohibiting secret trials. *Dutton v. State*, 123 Md. 373, 386–388, 91 A. 417, 422–423.

[21] Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 389. The criminal procedure of the civil law countries long resembled that of the Inquisition in that the preliminary examination of the accused, the questioning of witnesses, and the trial of the accused were conducted in secret. Esmein, A History of Continental Criminal Procedure 183–382 (1913); Ploscowe, *Development of Inquisitorial and Accusatorial Elements in French Procedure*, 23 J. Crim. L. & Criminology 372–386. The ecclesiastical courts of Great Britain, which intermittently exercised a limited civil and criminal jurisdiction, adopted a procedure described as "in name as well as in fact an Inquisition, differing from the Spanish Inquisition in the circumstances that it did not at any time as far as we are aware employ torture, and that the bulk of the business of the courts was of a comparatively

the English Court of Star Chamber,[22] and to the French monarchy's abuse of the *lettre de cachet*.[23] All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an

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unimportant kind . . . ." 2 Stephen, History of the Criminal Law of England 402 (1883). The secrecy of the ecclesiastical courts and the civil law courts was often pointed out by commentators who praised the publicity of the common law courts. See *e. g.*, 3 Blackstone, Commentaries *373; 1 Bentham Rationale of Judicial Evidence, 594–595, 603 (1827). The English common law courts which succeeded to the jurisdiction of the ecclesiastical courts have renounced all claim to hold secret sessions in cases formerly within the ecclesiastical jurisdiction, even in civil suits. See, *e. g.*, *Scott* v. *Scott*, [1913] A. C. 417.

[22] *Davis* v. *United States*, 247 F. 394, 395; *Keddington* v. *State*, 19 Ariz. 457, 459, 172 P. 273; *Williamson* v. *Lacy*, 86 Me. 80, 82–83, 29 A. 943, 944; *Dutton* v. *State*, 123 Md. 373, 387, 91 A. 417, 422; Jenks, The Book of English Law 91 (3d ed. 1932). Some authorities have said that trials in the Star Chamber were public, but that witnesses against the accused were examined privately with no opportunity for him to discredit them. Apparently all authorities agree that the accused himself was grilled in secret, often tortured, in an effort to obtain a confession and that the most objectionable of the Star Chamber's practices was its asserted prerogative to disregard the common law rules of criminal procedure when the occasion demanded. 5 Holdsworth, A History of English Law, 163, 165, 180–197 (2d ed. 1937); Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 386–388; Washburn, *The Court of Star Chamber*, 12 Am. L. Rev. 21, 25–31.

[23] Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 388. The *lettre de cachet* was an order of the king that one of his subjects be forthwith imprisoned or exiled without a trial or an opportunity to defend himself. In the eighteenth century they were often issued in blank to local police. Louis XV is supposed to have issued more than 150,000 *lettres de cachet* during his reign. This device was the principal means employed to prosecute crimes of opinion, although it was also used by the royalty as a convenient method of preventing the public airing of intra-family scandals. Voltaire, Mirabeau and Montesquieu, among others, denounced the use of the *lettre de cachet*, and it was abolished after the French Revolution, though later temporarily revived by Napoleon. 13 Encyc. Brit. 971; 3 Encyc. Soc. Sci. 137.

instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society,[24] the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.[25] One need not wholly agree with a statement made on the subject by Jeremy Bentham over 120 years ago to appreciate the fear

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[24] Other benefits attributed to publicity have been: (1) Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony. 6 Wigmore, Evidence § 1834 (3d ed. 1940); *Tanksley* v. *United States*, 145 F. 2d 58, 59.

(2) The spectators learn about their government and acquire confidence in their judicial remedies. 6 Wigmore, Evidence § 1834 (3d ed. 1940); 1 Bentham, Rationale of Judicial Evidence 525 (1827); *State* v. *Keeler*, 52 Mont. 205, 156 P. 1080; 20 Harv. L. Rev. 489.

[25] Jenks, The Book of English Law 91 (1932); Auld, *Comparative Jurisprudence of Criminal Process*, 1 U. of Toronto L. J. 82, 99; Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381; *Criminal Procedure in Scotland and England*, 108 Edinburgh Rev. 174, 181–182; Holmes, J. in *Cowley* v. *Pulsifer*, 137 Mass. 392, 394; *State* v. *Osborne*, 54 Ore. 289, 295–297, 103 P. 62, 64–66. *People* v. *Murray*, 89 Mich. 276, 286, 50 N. W. 995, 998: "It is for the protection of all persons accused of crime—the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule [as to public trials] must be observed and applied to all." Frequently quoted is the statement in 1 Cooley, Constitutional Limitations (8th ed. 1927) at 647: "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ."

of secret trials felt by him, his predecessors and contemporaries. Bentham said: ". . . suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." [26]

In giving content to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial.[27] But, unless in Michigan and in one-man grand jury contempt cases, no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches.[28] And without exception all courts have held that an accused is at the very least entitled to have his

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[26] 1 Bentham, Rationale of Judicial Evidence 524 (1827).

[27] Compare *People* v. *Murray*, 89 Mich. 276, 50 N. W. 995; and *People* v. *Yeager*, 113 Mich. 228, 71 N. W. 491, with *Reagan* v. *United States*, 202 F. 488. For collection and analysis of the cases, see 6 Wigmore, Evidence § 1834 (3d ed. 1940); Orfield, Criminal Procedure from Arrest to Appeal 385–387 (1947); Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 389–391; Note, 35 Mich. L. Rev. 474; 8 U. of Det. L. J. 129; 156 A. L. R. 265.

[28] "For the purposes contemplated by the provision of the Constitution, the presence of the officers of the court, men who, it is safe to say, were under the influence of the court, made the trial no more public than if they too had been excluded." *People* v. *Hartman*, 103 Cal. 242, 244, 37 P. 153, 154.

friends, relatives and counsel present, no matter with what offense he may be charged.[29] In *Gaines* v. *Washington*, 277 U. S. 81, 85–86, this Court assumed that a criminal trial conducted in secret would violate the procedural requirements of the Fourteenth Amendment's due process clause, although its actual holding there was that no violation had in fact occurred, since the trial court's order barring the general public had not been enforced. Certain proceedings in a judge's chambers, including convictions for contempt of court, have occasionally been countenanced by state courts,[30] but there has never been any intimation that all of the public, including the accused's relatives, friends, and counsel, were barred from the trial chamber.

In the case before us, the petitioner was called as a witness to testify in secret before a one-man grand jury conducting a grand jury investigation. In the midst of petitioner's testimony the proceedings abruptly changed. The investigation became a "trial," the grand jury became a judge, and the witness became an accused charged with contempt of court—all in secret. Following a charge, conviction and sentence, the petitioner was led away to prison—still without any break in the secrecy. Even in

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[29] See, *e. g.*, *State* v. *Beckstead*, 96 Utah 528, 88 P. 2d 461 (error to exclude friends and relatives of accused); *Benedict* v. *People*, 23 Colo. 126, 46 P. 637 (exclusion of all except witnesses, members of bar and law students upheld); *People* v. *Hall*, 51 App. Div. 57, 64 N. Y. S. 433 (exclusion of general public upheld where accused permitted to designate friends who remained). "No court has gone so far as affirmatively to exclude the press." Note, 35 Mich. L. Rev. 474, 476. Even those who deplore the sensationalism of criminal trials and advocate the exclusion of the general public from the courtroom would preserve the rights of the accused by requiring the admission of the press, friends of the accused, and selected members of the community. Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 394–395; 20 J. Am. Jud. Soc. 139.

[30] Cases are collected in 27 Ann. Cas. 35.

jail, according to undenied allegations, his lawyer was denied an opportunity to see and confer with him. And that was not the end of secrecy. His lawyer filed in the State Supreme Court this habeas corpus proceeding. Even there, the mantle of secrecy enveloped the transaction and the State Supreme Court ordered him sent back to jail without ever having seen a record of his testimony, and without knowing all that took place in the secrecy of the judge's chambers. In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

Second. We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.[31] Michigan, not denying the existence of these rights in criminal cases generally, apparently concedes that the summary conviction here would have been a denial of procedural due process but for the nature of the charge,

[31] The following decisions of this Court involving various kinds of proceedings are among the multitude that support the above statement: *Snyder* v. *Massachusetts*, 291 U. S. 97, 116; *Powell* v. *Alabama*, 287 U. S. 45, 68–70; *Hovey* v. *Elliot*, 167 U. S. 409, 418; *Holden* v. *Hardy*, 169 U. S. 366, 390–391; *Morgan* v. *United States*, 304 U. S. 1, 14–15, and cases there cited.

namely, a contempt of court, committed, the State urges, in the court's actual presence.

It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. *Ex parte Terry*, 128 U. S. 289, was such a case. There Terry committed assault on the marshal who was at the moment removing a heckler from the courtroom. The "violence and misconduct" of both the heckler and the marshal's assailant occurred within the "personal view" of the judge, "under his own eye," and actually interrupted the trial of a cause then under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing, although his conduct may also be punishable as a criminal offense. This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by immediate punishment. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise. Indeed in the *Terry* case the Court cited with approval its decision in *Anderson* v. *Dunn*, 6 Wheat. 204, which had marked the limits of contempt authority in general as being "the least possible power adequate to the end proposed." *Id.* at 231. And see *In re Michael*, 326 U. S. 224, 227.

That the holding in the *Terry* case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in *Cooke* v. *United States*, 267 U. S. 517, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited

power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the *Terry* rule as reaching only such conduct as created "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public" that, if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Id.* at 536.

Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority before the public." If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the *Cooke* case, that the accused be accorded notice and a fair hearing as above set out.

The facts shown by this record put this case outside the narrow category of cases that can be punished as contempt without notice, hearing and counsel. Since the petitioner's alleged misconduct all occurred in secret, there could be no possibility of a demoralization of the court's authority before the public. Furthermore, the answer of the judge-grand jury to the petition for habeas corpus showed that his conclusion that the petitioner had testified falsely was based, at least in part, upon the testimony given before him by one or more witnesses other than petitioner. Petitioner and one Hartley both testified the same day; both were pin-ball machine operators; both had bought or had in their possession certain so-called bonds purchased from one Mitchell; both were sent to jail for contempt the same day. *In re Hartley*, 317 Mich. 441, 27 N. W. 2d 48. The judge-grand jury pressed both petitioner and Hartley to state why they bought bonds which were patently worthless. The petitioner was also repeatedly asked what he had done with the worthless bonds. He answered every question asked him, according to the fragmentary portions of his testimony reported to the Michigan Supreme Court, most of which is included in that court's opinion. He steadfastly denied that he knew precisely what he had done with the worthless bonds, but made several different statements as to how he might have disposed of them, such as that he might have thrown them into the wastebasket, or trash can, or might have burned them.

In upholding the judge-grand jury's conclusion that petitioner had testified falsely and evasively, the majority of the Michigan Supreme Court gave as one reason a statement in the judge-grand jury's answer "That the Grand Jury, after investigation, is satisfied that the bonds sold by the said Carman A. Mitchell to the said William D. Oliver are the same as those sold by the said Carman A. Mitchell to Leo Thomas Hartley." Nothing in the peti-

tioner's testimony as reported could have remotely justified the judge-jury in drawing such a conclusion. The judge-jury was obviously appraising the truth of Oliver's testimony in light of testimony given the same day in petitioner's absence by Hartley and possibly by other witnesses. The *Terry* case and others like it provide no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence. This case would be like the *Terry* case only if the judge there had not personally witnessed Terry's assault upon the marshal but had nevertheless sent him to jail for contempt of court after hearing the testimony of witnesses against Terry in Terry's absence. It may be conceivable, as is here urged, that a judge can under some circumstances correctly detect falsity and evasiveness from simply listening to a witness testify. But this is plainly not a case in which the finding of falsity rested on an exercise of this alleged power. For this reason we need not pass on the question argued in the briefs whether a judge can, consistently with procedural due process, convict a witness of testifying falsely and evasively solely on the judge's ability to detect it from merely observing a witness and hearing him testify.

Nor is there any reason suggested why "demoralization of the court's authority" would have resulted from giving the petitioner a reasonable opportunity to appear and offer a defense in open court to a charge of perjury or to the charge of contempt. The traditional grand juries have never punished contempts.[22] The practice that has always been followed with recalcitrant grand jury witnesses is to take them into open court, and that practice, consistent with due process, has not demoralized the authority of courts. Reported cases reveal no instances in which witnesses believed by grand juries on the basis of

[22] See note 10 *supra*.

other testimony to be perjurers, have been convicted for contempt, or for perjury, without notice of the specific charges against them, and opportunity to prepare a defense, to obtain counsel, to cross-examine the witnesses against them and to offer evidence in their own defense. The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of "demoralization of the court's authority."

It is "the law of the land" that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See *Chambers* v. *Florida*, 309 U. S. 227, 236–237. The petitioner was convicted without that kind of trial.

The judgment of the Supreme Court of Michigan is reversed and the cause is remanded to it for disposition not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 215.—October Term, 1947.

In re William Oliver, Petitioner. | On Writ of Certiorari to the Supreme Court of the State of Michigan.

[March 8, 1948.]

Mr. Justice Rutledge, concurring.

I join in the Court's opinion and decision. But there is more which needs to be said.

Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury. This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections secured by the Sixth Amendment, namely, the rights "to be informed of the nature and cause of the accusation;[1] to be confronted with the witnesses against him;[2] to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." It takes away the security against being twice put in jeopardy for the same offense[3] and denies the equal protection

[1] The requirement, of course, contemplates that the accused be so informed sufficiently in advance of trial or sentence to enable him to determine the nature of the plea to be entered and to prepare his defense if one is to be made. Cf. *White* v. *Ragen*, 324 U. S. 760, 764; *Powell* v. *Alabama*, 287 U. S. 45.

[2] The only "witness" in this case was the grand jury-judge who, so far as the record discloses, did not submit to cross-examination.

[3] As the Court's opinion notes, the state supreme court has held that the witness may be reexamined and recommitted for a further 60-day period after serving the first sentence of that length, unless he reappears and answers the same questions to the satisfaction of the one-man grand jury. *In re Ward*, 295 Mich. 742, 747.

of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal.[4] U. S. Const. Amend. V and XIV.

This aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law at the time our institutions crystallized in the Constitution. They are altogether at variance with our tradition and system of government. They cannot stand the test of constitutionality for purposes of depriving any person of life, liberty or property. There is no semblance of due process of law in the scheme when it is used for those ends.[5]

The case demonstrates how far this Court departed from our constitutional plan when, after the Fourteenth Amendment's adoption, it permitted selective departure by the states from the scheme of ordered personal liberty established by the Bill of Rights.[6] In the guise of permitting the states to experiment with improving the administration of justice, the Court left them free to substitute, "in spite of the absolutism of continental governments," their "ideas and processes of civil justice" in place of the time-tried "principles and institutions of the common law" [7] perpetuated for us in the Bill of Rights. Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in

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[4] Cf. *Cochran* v. *Kansas*, 316 U. S. 255. So far as appears, only persons committed or fined by a one-man grand jury are subjected in Michigan to this attenuated appellate procedure. Others convicted of crime, including criminal contempt, apparently are afforded rights to complete and nondiscretionary records on appeal.

[5] The immediate shift of the proceeding from inquisitorial to punitive function converts it from a grand jury investigation to a proceeding in criminal contempt.

[6] Cf. *Adamson* v. *California*, 332 U. S. 46, dissenting opinion of MR. JUSTICE BLACK at 68.

[7] See *Hurtado* v. *California*, 110 U. S. 516, 531.

this case. It is the immediate offspring of *Hurtado* v. *California*, 110 U. S. 516, and later like cases.*

So long as they stand, so long as the Bill of Rights is regarded here as a strait jacket of Eighteenth Century procedures rather than a basic charter of personal liberty, like experimentations may be expected from the states. And the only check against their effectiveness will be the agreement of a majority of this Court that the experiment violates fundamental notions of justice in civilized society.

I do not conceive that the Bill of Rights, apart from the due process clause of the Fifth Amendment, incorporates all such ideas. But as far as its provisions go, I know of no better substitutes. A few may be inconvenient. But restrictions upon authority for securing personal liberty, as well as fairness in trial to deprive one of it, are always inconvenient—to the authority so restricted. And in times like these I do not think substitutions imported from other systems, including continental ones, offer promise on the whole of more improvement than harm, either for the cause of perfecting the administration of justice or for that of securing and perpetuating individual freedom, which is the main end of our society as it is of our Constitution.

One cannot attribute the collapse of liberty in Europe and elsewhere during recent years solely to the "ideas and processes of civil justice" prevailing in the nations which have suffered that loss. Neither can one deny the significance of the contrast between their success in maintaining systems of ordered liberty and that of other nations which in the main have adhered more closely to the scheme of personal freedoms the Bill of Rights secures. This experience demonstrates, I think, that it is both wiser

* *E. g.*, *Twining* v. *New Jersey*, 211 U. S. 78; *Adamson* v. *California*, 332 U. S. 46.

and safer to put up with whatever inconveniences that charter creates than to run the risk of losing its hard-won guaranties by dubious, if also more convenient substitutions imported from alien traditions.[9]

The states have survived with the nation through great vicissitudes, for the greater part of our history, without wide departures or numerous ones from the plan of the Bill of Rights. They accepted that plan for the nation when they ratified those amendments. They accepted it for themselves, in my opinion, when they ratified the Fourteenth Amendment. *Adamson* v. *California*, 332 U. S. 46, dissenting opinions, at 68, 123. It was good enough for our fathers. I think it should be good enough for this Court and for the states.

Room enough there is beyond the specific limitations of the Bill of Rights for the states to experiment toward improving the administration of justice. Within those limitations there should be no laboratory excursions, un-

[9] I do not think it can be demonstrated that state systems, freed of the Bill of Rights' "inconveniences," have been more fair, just, or efficient than the federal system of administering criminal justice, which has never been clear of their restraints.

Notwithstanding *Betts* v. *Brady*, 316 U. S. 455, and its progeny, I cannot imagine that state denial of the right to counsel beyond that permissible in the federal courts or indeed of any other guaranty of the Sixth Amendment could bring an improvement in the administration of justice.

The guaranties seemingly considered most obstructive to that process are those of the Fifth Amendment requiring presentment or indictment of a grand jury and securing the privilege against self-incrimination; the rights to jury trial and to the assistance of counsel secured by the Sixth Amendment; and the requirements relating to suits at common law of the Seventh Amendment. Whatever inconveniences these or any of them may be thought to involve are far outweighed by the aggregate of security to the individual afforded by the Bill of Rights. That aggregate cannot be secured, indeed it may be largely defeated, so long as the states are left free to make broadly selective application of its protections.

less or until the people have authorized them by the constitutionally provided method. This is no time to experiment with established liberties. That process carries the dangers of dilution and denial with the chances of enforcing and strengthening.

It remains only to say that, in the face of so broad a departure from so many specific constitutional guaranties or, if the other view is to control, from their aggregate summarized in the concept of due process as representing fundamental ideas of fair play and justice in civilized society, such as the record in this case presents, this Court's eyes need not remain closed nor its hand idle until the case is returned to the state supreme court for reaffirmation of its position or confirmation of our views expressed in the Court's opinion. Neither *Rescue Army* v. *Municipal Court*, 331 U. S. 549, nor *Musser* v. *Utah*, 333 U. S. —, presented a situation like the one tendered here, whether in relation to the disentanglement of constitutional issues from questions of state law or, consequently, in respect to the breadth and clarity of the state's departure from federal constitutional commands. Neither case therefore requires or justifies the disposition of this cause according to the procedure there followed. This case is neither unripe for decision nor wanting of sufficient basis in the record for exercise of that function.

SUPREME COURT OF THE UNITED STATES

No. 215.—October Term, 1947.

In re William Oliver, Petitioner. / On Writ of Certiorari to the Supreme Court of Michigan.

[March 8, 1948.]

Mr. Justice Frankfurter:

Under the Fourteenth Amendment, a State may surely adopt as its own a procedure which was the established method for prosecuting crime in nearly half the States which ratified that amendment. And so, it may abolish the grand jury,[1] or it may reduce the size of the grand jury, and even to a single member. A State has great leeway in devising its judicial instruments for probing into conduct as a basis for charging the commission of

[1] In sustaining this power of the States, the Court enunciated a principle the force of which has not lessened with time: "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms." *Hurtado* v. *California*, 110 U. S. 516, 530–31.

crime. It may, at the same time, surround such preliminary inquiry with safeguards, not only that crime may be detected and criminals punished, but also that charges may be sifted in secret so as not to injure or embarrass the innocent.

Flouting of such a judicial investigatory system may be prevented by the hitherto constitutionally valid power to punish for contempt. There must, however, be such recalcitrance, where the basis of punishment is testimony given or withheld, that the administration of justice is actively blocked. See *Ex parte Hudgings*, 249 U. S. 378. And the procedural safeguards of "due process" must be observed. Due notice of the charge and a fair opportunity to meet it, are indispensable. This involves an opportunity to canvass the charge in the open and not behind closed doors. So long as a man has ample opportunity to demonstrate his innocence before he is hustled off to jail, he cannot complain that a State has seen fit to devise a new procedure for satisfying that opportunity. Just as it is not violative of due process for a State to take private property for public use and leave to a later stage the constitutional vindication of the right to compensation, it does not seem to me that it would be violative of due process to allow the judge-grand juror of Michigan to find criminal contempt for conduct in his proceedings without the familiar elements of an open trial, provided that the State furnishes the accused a public tribunal before which he has full opportunity to be quit of the finding.

But an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair, if in the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting.

We are here dealing with the attempt of a State having the seventh largest population in the Union to curb or mitigate the commission of crimes by effective prosecution. This procedure has been in operation for over thirty years. It was not heedlessly entered into nor has it been sporadically pursued. In a series of cases it has had the sanction of the highest court of Michigan. While there are indications in the opinion of the Supreme Court of Michigan from which we could infer the constitutional inadequacy of the procedure pursued in this case, we should not decide constitutional issues and conclude that the Michigan system offends the Constitution of the United States, without a clearer formulation of what it is that actually happens under this system, or did happen here, than the case before us reveals.

It is to me significant that the precise issues on which this Court decides this case have never been explicitly challenged before, or passed on, by the Supreme Court of Michigan in the series of cases in which that court had adjudicated controversies arising under the Michigan grand jury system. If a State has denied the due process required by the Fourteenth Amendment, it is more consonant with the delicate relations between the United States and the courts of the United States, and the States and the courts of the States, that the courts of the States be given the fullest opportunity, by proper presentation of the issues, to make such a finding of unconstitutionality.

I do not think that we have had that in this case. For instance, while I could regard it inadmissible under the Fourteenth Amendment to have only a partial and mutilated record of the proceedings before the grand juror-judge when the contemnor for the first time has the opportunity to meet the accusation against him publicly, the petitioner himself in this case seems to repel the

suggestion that that is his complaint.[2] Certainly, as MR. JUSTICE JACKSON points out, the first ground of the Court's opinion was not made the basis for inviting our review here. I agree with him in concluding that in the light of our decision the other day in *Musser* v. *Utah*, 333 U. S. —, in conjunction with *Rescue Army* v. *Municipal Court*, 331 U. S. 549, the cause should be returned to the Supreme Court of Michigan to enable that court to pass upon these issues.

[2] "Neither in our brief nor in our argument before the court have we urged this court to reverse this conviction merely because the partial return of the witness's testimony to the Supreme Court constituted a denial of due process. . . . The questions we present are much more basic,—the denial of due process in the original commitment. . . . [To] us it is much more shocking that an accused charged with contempt not committed in open court be denied *any* trial in the lower court than that he be given a trial only upon an incomplete record in the appellate court." Petitioner's "Brief in Answer to Brief of State Bar of Michigan," pp. 13-14.

SUPREME COURT OF THE UNITED STATES

No. 215.—October Term, 1947.

In re William Oliver, Petitioner. | On Writ of Certiorari to the Supreme Court of Michigan.

[March 8, 1948.]

Mr. Justice Jackson, with whom Mr. Justice Frankfurter agrees, dissenting.

The principal ground assigned for reversal of the judgment of conviction is the alleged secrecy of the contempt procedure. That ground was not assigned for review in the petition for certiorari to this Court. Nor was it raised in the petition for writ of *habeas corpus* in the state courts. Therefore, it has not been litigated and the record has not been made with reference to it. On the other hand, the principal question raised by the petition to this Court and argued by the State is not decided by the Court's opinion.

When a case here from a state court involves a question not litigated below, not raised by petitioner here and which the state court has had no opportunity to pass upon, we should remand the case for its further consideration, as was just done in *Musser* v. *Utah*, 333 U. S. —.